BYU Law Review

Volume 47 | Issue 5 Article 7

Summer 6-20-2022

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Thomas G. Donnelly

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Commentators offer the Justices consistent – if unsolicited – advice: tend to the Supreme Court's institutional legitimacy. However, to say this – without saying more – is to say very little. Of course, constitutional theorists already wrestle with the meaning of legitimacy – its contours, its complexity, and its influence on the Justices. Political scientists debate the relationship between institutional concerns and judicial behavior. At the same time, previous scholars largely ignore issues of constitutional practice. This is a mistake. In this Article, I take up this neglected topic. To that end, I detail how the individual Justice might work to bolster the Court's legitimacy in concrete cases. Part of the answer turns on legal craft – identifying the tools available to a Justice as she decides individual cases. However, part of it also requires adopting a regime perspective – ensuring that a Justice's actions meet the challenges of her own constitutional moment. In my account, Chief Justice Roberts takes centerstage. Beginning with legal craft, I analyze the tools that Roberts employs to preserve the Court's legitimacy in concrete cases – namely, coalition building, calls for action by the elected branches, incrementalism, charity for the opposing side, triangulating between constitutional extremes, and promoting a vision of institutional humility. From there, I adopt a regime perspective, charting three future paths for the Roberts Court – each with its own set of challenges for the Justices as they seek to preserve the Court's institutional legitimacy.

* Thomas G. Donnelly. Senior Fellow for Constitutional Studies, National Constitution Center; J.D., Yale Law School; M.A., Princeton University; B.A., Georgetown University. For their suggestions, encouragement, and inspiration, I extend my deep thanks to Bruce Ackerman, Paul Frymer, John Kastellec, Stephen Macedo, Jan-Werner Mueller, Robert Post, Jeffrey Rosen, Kim Lane Scheppele, and Keith Whittington. The views expressed in this Article are my own.

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INTRODUCTION

Concerns about the Supreme Court's legitimacy abound.[1] It's easy to see why.

American politics is divided and volatile. Neither party can secure political hegemony.[2] Each election cycle is highly competitive.[3] The presidency shifts from party to party. And the same goes for control of Congress. In Washington, polarization is high.[4] Gridlock is pervasive.[5] And political compromise is rare.[6] At the same time, these political divisions extend beyond Washington. Across the country, political partisans divide sharply.[7] Faith in America's political institutions is at an all-time low.[8] And Americans distrust their government—and one another.[9]

In the face of this period of polarization and political instability, the Roberts Court is entering its own period of ideological stasis.

1. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2243 (2019).

2. *See* MARC J. HETHERINGTON & THOMAS J. RUDOLPH, WHY WASHINGTON WON'T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS 3 (2015).

3. *See* Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 263, 268 (2015).

4. *See* MATT GROSSMANN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 3 (2016); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES, at ix, 10, 73–74 (2d ed. 2016); ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY 10–11 (2011); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 413 (2014); Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 38 (2000).

5. Lee, *supra* note 3, at 274–75.

6. *Cf.* HETHERINGTON & RUDOLPH, *supra* note 2, at 17.

7. *See* GABRIEL S. LENZ, FOLLOW THE LEADER?: HOW VOTERS RESPOND TO POLITICIANS' POLICIES AND PERFORMANCE 5–9 (2012); MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 3 (2009); Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAV. 117, 119 (2002).

8. MCCARTY ET AL., *supra* note 4, at 4.

9. *See* JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 46 (2020).

With the confirmation of Justice Amy Coney Barrett, President Trump and the Republican Party managed to build a young and stable conservative majority. Of course, not all conservative Justices are created equal.[10] Judicial biography isn't destiny.[11] And a Justice's normative preferences don't determine her every vote.[12] But they *do* matter—both to public perceptions and to case outcomes.[13]

This contrast between political volatility in the elected branches and ideological stasis on the Supreme Court represents both an opportunity and a challenge for the Roberts Court's conservative majority. Within the elected branches, political divisions often lead to dysfunction and gridlock.[14] This political environment may empower the Roberts Court—allowing it to act when the elected branches, especially Congress, cannot.[15] At the same time, it may also present new risks to the Roberts Court's institutional legitimacy.[16]

Simply put, Supreme Court legitimacy speaks to the public's general support for the Court as an institution.[17] As Gregory Caldeira and James Gibson explain, when the American people view the Court as a legitimate actor within our constitutional system, they "may well disagree with" some of the Court's specific rulings, while continuing "to concede" its broader authority to decide cases and settle constitutional issues.[18] Over time, the Court has maintained relatively high and stable levels of public support—especially when compared to the President and Congress.[19] Even so, the current political environment may place a strain on the relationship between the American people and the Supreme Court.

10. *See* Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the U.S. Supreme Court*, 83 N.C. L. REV. 1275, 1277 (2005).

11. *See* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1483–85 (2007).

12. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 33–36 (1998).

13. *See* JEFFREY SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 76–85 (2002); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992).

14. HETHERINGTON & RUDOLPH, *supra* note 2, at 1–2.

15. Lee, *supra* note 3, at 273–74.

16. *See* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 299–300 (2019).

17. Caldeira & Gibson, *supra* note 13, at 637.

18. *Id.*

19. *See* Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1115 (1997).

With political power shifting from election cycle to election cycle and the Court's conservative majority locked in place, the Roberts Court will sometimes—and, perhaps, often—find itself in conflict with the party in power. Over time, if Democrats find consistent success in the elected branches and suffer consistent losses at the Roberts Court, it's only natural that they may lose faith in the Supreme Court as an institution.[20] Furthermore, if the Roberts Court itself issues decisions that consistently favor one party's political agenda, the American people may come to view the Court *not* as a legal institution that transcends partisan politics, but, instead, as a political institution that serves as a faithful agent of one of our nation's political parties.[21]

In the face of these challenges, commentators have offered the Justices consistent—if unsolicited—advice: *tend to the Supreme Court's institutional legitimacy*.[22] However, to say this—without saying more—is to say very little. When deciding a constitutional case, should the Court defer to the elected branches?[23] Apply existing precedent?[24] Craft a minimalist compromise?[25] Stick to previous methodological commitments?[26] Model superb legal

20. *See* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 968 (2008).

21. Grove, *supra* note 1, at 2243.

22. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 374 (2009); Linda Greenhouse, *The Many Dimensions of the Chief Justice's Triumphant Term*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/opinion/supreme-court-roberts-religion.html; Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/; Nina Totenberg, *A Powerful Chief and Unexpected Splits: 6 Takeaways From the Supreme Court Term*, N.Y. PUB. RADIO (July 11, 2020), https://www.wnyc.org/story/a-powerful-chief-and-unexpected-splits-6-takeaways-from-the-supreme-court-term; Dahlia Lithwick & Mark Joseph Stern, *The Political Genius of John Roberts*, SLATE (July 9, 2020, 4:11 PM), https://slate.com/news-and-politics/2020/07/political-genius-supreme-court-john-roberts.html; Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html.

23. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 134 (1893).

24. *See* Wallace Mendelson, *The Neo-Behavioral Approach to Judicial Process: A Critique*, 57 AM. POL. SCI. REV. 593, 597 (1963).

25. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 11 (1999).

26. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 126–27 (2018).

craftmanship?[27] Follow the most recent opinion polls?[28] Minimize the risk of public, or elite, backlash?[29] Pursue its own sense of morality or sound policy?[30] Or rule in a way that surprises Court watchers?[31] Constitutional advice varies by commentator.

Concededly, many commentators *do* agree that to preserve the Court's legitimacy, the Justices must often set aside their own policy preferences, transcend partisan politics, and build cross-ideological coalitions.[32] On this view, American politics is hopelessly polarized.[33] The parties divide on nearly every issue.[34] Party members despise the political opposition.[35] And elected officials rarely reach compromises that cross party lines.[36] By embracing coalition building, the Justices can prove that the Supreme Court is different (and better) than the elected branches.

Plus, this advice has an added benefit for Court watchers. It provides them with a simple proxy for determining when to celebrate the Court and its rulings—evidence of surprise votes that cross ideological lines. However, the Court's legitimacy turns on more than simple coalition building and a jurisprudence of surprise. Cross-ideological coalitions err.[37] Shoddy legal reasoning harms the Court's reputation.[38] Unpopular rulings expose the Court as a group of out-of-touch elites.[39] And negative

27. *See* Felix Frankfurter, *The Court and Statesmanship*, *in* LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938, 34, 34–35 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939).

28. *See* Tom Donnelly, *Popular Constitutional Argument*, 73 VAND. L. REV. 73, 131–33 (2020).

29. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464 (2004).

30. *See* David A. Strauss, THE LIVING CONSTITUTION 38 (2010).

31. *See* Noah Feldman, *The Supreme Court Is Still Capable of Shocking the Nation*, BLOOMBERG (July 13, 2020), https://www.yahoo.com/now/supreme-court-still-capable-shocking-191159581.html.

32. *See, e.g.*, GARY J. JACOBSOHN, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 20–22, 181–92 (1977); Rosen, *supra* note 22; Jonathan Rauch, *SCOTUS' ACA Decision: An "Act of Judicial Statesmanship"*, BROOKINGS (June 28, 2012), https://www.brookings.edu/opinions/scotus-aca-decision-an-act-of-judicial-statesmanship/.

33. Lee, *supra* note 3, at 263.

34. LEVENDUSKY, *supra* note 7, at 3.

35. *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 232–66 (2016).

36. HETHERINGTON & RUDOLPH, *supra* note 2, at 17.

37. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (involving *both* Republican- *and* Democratic-appointed Justices uniting behind the doctrine of "separate but equal").

38. FALLON, *supra* note 26, at 83–104.

39. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 17–18 (1996).

consequences undermine the public's faith in the Court's practical wisdom.[40] In short, Supreme Court legitimacy requires more than a politics of compromise.

Of course, the existing literature on Supreme Court legitimacy already provides a framework for situating the Roberts Court's challenge within a broader context.[41] Constitutional theorists work to define the concept of legitimacy, explore its complexity, and explain how institutional concerns might shape the Court's decisions over time.[42] At the same time, political scientists address this topic as part of the discipline's broader debates over the dynamics of Supreme Court decision-making.[43] Overall, previous scholars provide powerful accounts of the structural factors and behavioral forces shaping the Court's legitimacy at any given moment. Even so, constitutional theorists and political scientists alike have spent far too little time on issues of constitutional practice. This is a mistake.

In this Article, I take up this neglected topic and explore the relationship between Supreme Court legitimacy and constitutional practice. To that end, I detail how the individual Justice might work to bolster the Court's legitimacy in concrete cases. Part of the answer turns on legal craft—identifying the tools available to a Justice as she decides individual cases. However, part of it also requires adopting a regime perspective—situating a Justice's actions within the flow of constitutional time.[44] In my account, Chief Justice Roberts takes center stage. With the confirmation of Justice Barrett, Roberts may no longer be in control of his own Court's destiny. However, his institutionalist sensibility—and his

40. FALLON, *supra* note 26, at 155–70.

41. *See generally* Barry Friedman, *Taking Law Seriously*, 4 PERSP. POL. 261, 265–72 (2006) (explaining the value of merging the insights of political science and legal scholarship).

42. *See, e.g.*, LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019); FALLON, *supra* note 26; Grove, *supra* note 1; Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

43. *See, e.g.*, NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2008); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Mondak & Smithey, *supra* note 19, at 1115; Jeffrey J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 L. & SOC'Y REV. 599 (1993); Caldeira & Gibson, *supra* note 13.

44. BALKIN, *supra* note 9, at 6.

approach to concrete cases—may still meet the challenges of the current constitutional moment.

In Part I, I review the existing literature on Supreme Court legitimacy—exploring the key contributions of both constitutional theorists and political scientists. From there, I frame my own contribution.

In Part II, I address the relationship between Supreme Court legitimacy and constitutional practice—using Chief Justice Roberts's tenure on the Supreme Court as a case study in how an individual Justice might tend to the Court's legitimacy as a matter of legal craft. To that end, I analyze the tools that Roberts himself employs to preserve the Court's institutional legitimacy in concrete cases—namely, coalition building, calls for action by the elected branches, incrementalism, charity for the opposing side, triangulating between constitutional extremes, and promoting a vision of institutional humility. This extended case study is my central focus—and this Article's main contribution. While previous scholars have highlighted the Chief Justice's institutionalist mission, no scholar has catalogued—and assessed—the concrete tactics that he uses to pursue it.

Finally, in Part III, I adopt a regime perspective—situating an individual Justice's mission within the politics of a period's governing regime.[45] To that end, I review the regime politics literature—exploring how a Justice's place in constitutional time might constrain the politics that she may make at any given moment.[46] I frame the Roberts Court's current challenge—analyzing the constitutional politics of our polarized age and exploring how this political environment threatens the Court's institutional legitimacy. And I preview the future—charting *three* possible paths for the Roberts Court, each with its own set of challenges for the Justices and their efforts to preserve the Court's institutional legitimacy: (1) a Republican political reconstruction, with the *Republican* Party leading a new governing regime; (2) a Democratic political reconstruction, with the *Democratic* Party

45. For leading accounts of regime theory in political science, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) and STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON (1997).

46. *See* Paul Frymer, *Law and American Political Development*, 33 L. & SOC. INQUIRY 779, 779–80 (2008); RONALD KAHN & KEN I. KERSCH, THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 8 (Ronald Kahn & Ken I. Kersch eds., 2006).

emerging as our nation's dominant political force; and (3) a political stalemate, with our nation's politics remaining competitive and *neither* party securing an enduring majority.[47]

I. THE SUPREME COURT AND INSTITUTIONAL LEGITIMACY: LEARNING FROM CONSTITUTIONAL THEORY AND POLITICAL SCIENCE

Scholars have long wrestled with the concept of Supreme Court legitimacy—and it isn't hard to understand why.[48] The Court operates within certain institutional constraints.[49] The Justices aren't elected.[50] They serve for life.[51] They have no army or police force of their own.[52] As Alexander Bickel explained a half-century ago, for the Supreme Court's rulings to have force, the Justices must secure "the cooperation first of political institutions" and "ultimately of the American people."[53]

In their own influential work on Supreme Court legitimacy, Gregory Caldeira and James Gibson describe the relationship between public support for the Court and the Court's own institutional authority:

> For the Supreme Court, public support bulks especially large; it is an uncommonly vulnerable institution. The Court lacks an electoral connection to provide legitimacy, is sometimes obliged to stand against the winds of public opinion, operates in an environment often intolerant of those in need of defense, and has none of the standard political levers over people and institutions.[54]

47. *See* WHITTINGTON, *supra* note 45, at 28–81; SKOWRONEK, *supra* note 45, at 33–58 (1997).

48. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 90 (1970) [hereinafter BICKEL, THE SUPREME COURT].

49. *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 3 (2012).

50. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH].

51. *See* THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (McLean's ed., 1788).

52. *See* Or Bassok, *The Changing Understanding of Judicial Legitimacy*, *in* JUDGES AS GUARDIANS OF HUMAN RIGHTS AND CONSTITUTIONALISM 50, 55 (Martin Scheinin, Helle Krunke & Marina Aksenova eds., 2016).

53. BICKEL, THE SUPREME COURT, *supra* note 48, at 90.

54. Caldeira & Gibson, *supra* note 13, at 635.

To overcome these obstacles, the Justices must often tend to the Court's institutional legitimacy.[55]

Previous scholarship explores the conceptual framework, structural factors, and behavioral forces framing this challenge. Constitutional theorists wrestle with the meaning of legitimacy—its contours, its complexity, and its influence on the Justices.[56] Political scientists study the public's attitudes towards the Court and debate the relationship between institutional concerns and judicial behavior.[57] Overall, this literature provides a helpful framework for understanding the factors shaping the Supreme Court's legitimacy over time. At the same time, it largely ignores issues of constitutional practice.

In this Part, I explore the contributions of constitutional theory and political science to debates over Supreme Court legitimacy. From there, I frame my own contribution.

A. What Constitutional Theory Teaches Us: A Theoretical Framework for Understanding Supreme Court Legitimacy

Beginning with constitutional theory, Richard Fallon provides the leading account of Supreme Court legitimacy in the literature.[58] For Fallon, the Court's reputation turns on its ability to balance between *three* types of legitimacy: legal, sociological, and moral.[59]

Legally, the Justices should use constitutional materials, arguments, and methodologies that are consistent with the conventions of legal culture.[60] On this view, the Court's legitimacy turns, in part, on the fact that the Justices draw on their own legal expertise in each case to do something that looks like law—not politics. To reinforce this image, each Justice should adopt a methodological approach that legal culture recognizes as legitimate and commit to it over a range of cases.[61] As Fallon explains, when

55. *See, e.g.*, BICKEL, THE SUPREME COURT, *supra* note 48, at 65–72 (describing how the Court often must negotiate the "tension between principle and expediency").

56. *See, e.g.*, LESSIG, *supra* note 42; FALLON, *supra* note 26; Grove, *supra* note 1; Fallon, *supra* note 42.

57. *See, e.g.*, DEVINS & BAUM, *supra* note 43; Friedman, *supra* note 43; Mondak & Smithey, *supra* note 19; Caldeira & Gibson, *supra* note 13.

58. *See* FALLON, *supra* note 26; Fallon, *supra* note 42.

59. *See* Fallon, *supra* note 42, at 1790.

60. FALLON, *supra* note 26, at 35–36.

61. *Id.* at 127; *see also* Siegel, *supra* note 20, at 970 ("Requiring judges to articulate reasons for their decisions disciplines them to the virtue of consistency—to deciding future

the Justices maintain methodological consistency over time, "we can respect their decisions, even if we think that both their methodological commitments and their substantive conclusions are ultimately mistaken."[62] Echoing Herbert Wechsler,[63] Fallon predicts that this approach may even lead a Justice to reach case outcomes that she opposes on policy grounds.[64] In Fallon's view, this is a "hallmark" of legal legitimacy—proving a Justice's fidelity to the law, not to her own policy preferences.[65]

Sociologically, the Supreme Court should operate as an institution that is respected by the American people—most notably, by offering a compelling vision of the Constitution.[66] On this view, the Court may preserve its sociological legitimacy through (at least) *two* types of rulings. First, the Court might issue decisions that are broadly popular with the American people today.[67] Second, it might pursue a path of constitutional redemption—challenging the American people's current views in an attempt to secure *future* support.[68] To that end, the Justices may reach an independent judgment about the practical benefits of their approach—even if that approach is in tension with (or in opposition to) existing public opinion.[69] This leads the Justices to make a certain strategic calculation. While a new ruling may cost the Court sociological

cases according to previously articulated reasons."). However, Fallon *does* allow for some interpretive flexibility—calling on each interpreter to reach a "reflective equilibrium" between their methodological commitments and their own "provisional, quasi-intuitive judgments" about the proper outcome in a given case. FALLON, *supra* note 26, at 127.

62. FALLON, *supra* note 26, at 131.

63. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

64. FALLON, *supra* note 26, at 18.

65. *Id.* Interestingly, Lawrence Lessig looks to complicate Fallon's account of legal legitimacy—arguing that legal fidelity often requires a Justice to balance between *two* key factors: her own best reading of the law ("fidelity to meaning") *and* the expectations of legal culture ("fidelity to role"). *See* LESSIG, *supra* note 42, at 5.

66. FALLON, *supra* note 26, at 21.

67. *Id.*; *see also* FRIEDMAN, *supra* note 22, at 10 (arguing that the Supreme Court often decides cases within the mainstream of public opinion).

68. FALLON, *supra* note 26, at 44; *see also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 2 (2011) (offering a Supreme Court narrative rooted in a redemptive vision of American constitutional history); BICKEL, THE SUPREME COURT, *supra* note 48, at 29 (arguing that the Supreme Court often tries to "predict the future"). *But see* Grove, *supra* note 1, at 2268 (warning that "[a] Justice may not be very adept at predicting the reaction of the public or the political branches").

69. FALLON, *supra* note 26, at 21; *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 249 (2002) ("[T]he real-world consequences of a particular interpretive decision, valued in terms of basic constitutional purposes, play an important role in constitutional decisionmaking.").

legitimacy today, it may help society (and the Court's reputation) in the long run.[70]

Morally, the Justices should issue decisions that are normatively attractive—if not to Americans today, then at least to certain key voices within future generations.[71] As Tara Leigh Grove explains, this evaluation turns in some independent sense on a Justice's conclusion about "whether people *should* treat a legal regime or its institutions as worthy of respect and obedience; for example, by virtually any measure, the Nazi regime in Germany was not . . . morally legitimate" even as it retained the appearance (and even practice) of formal law in certain areas.[72] Of course, today's lawyers, elected officials, and citizens *will* judge the Court's decisions from a moral perspective. However, so, too, will future Americans—especially key voices within the legal (and political) elite. As a result, the Court sometimes issues decisions that advance a moral vision today with a *future* audience in mind—predicting that history will judge its decisions favorably, even if most (or nearly all) Americans today do not.

In the end, to preserve the Supreme Court's institutional reputation, the Justices must tend to *each* type of legitimacy: legal, sociological, and moral. Of course, sometimes these forms of legitimacy may reinforce one another. However, other times they may not.[73] And while Fallon *does* provide a useful framework for understanding the underlying concept of legitimacy, he does so at a high level of abstraction. As a result, he spends little time on an individual Justice's practical task—in other words, how she might translate Fallon's conceptual framework into constitutional action at the case level.[74] In this Article, I take up this challenge—moving from constitutional theory to Supreme Court practice.

70. *Id.*; *see also* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 50, at 71 (exploring the tension between a Court's predictive judgments and its commitment to legal fidelity).

71. FALLON, *supra* note 26, at 21; *see also* STRAUSS, *supra* note 30, at 38 (arguing that judges often turn to independent moral judgments when carrying out their common-law duties).

72. Grove, *supra* note 1, at 2244.

73. *See, e.g.*, *id.* at 2272 (describing the tension between legal legitimacy and sociological legitimacy).

74. For instance, Fallon argues (correctly) that the Justices should sometimes issue rulings that express societal values tied to public opinion. FALLON, *supra* note 26, at 21. However, like many commentators, he offers few clues for how the Justices might carry out that form of popular constitutional analysis in concrete cases. For examples of scholars developing some details of how popular constitutional analysis might work, see Donnelly,

B. What Political Science Teaches Us: Judicial Decision-Making and the Mechanics of Supreme Court Legitimacy

Broadly speaking, the political science literature suggests *two* key mechanisms shaping the Supreme Court's institutional legitimacy over time: the mass public and the legal elite. Both audiences offer plausible explanations for why a Justice might moderate her own (legal or policy) views to tend to the Supreme Court's legitimacy.

1. The Mass Public, Institutional Legitimacy, and the Dynamics of Supreme Court Decision–Making

Compared to other institutions, the Supreme Court has maintained high and stable levels of public support over time.[75] This is true even as the Court sometimes issues controversial decisions on important topics like abortion and religious liberty.[76]

supra note 28; Tom Donnelly, *Judicial Popular Constitutionalism*, 30 CONST. COMMENT. 541 (2015); Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 343–44 (2013); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207 (2010); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 U.C.L.A. L. REV. 365 (2009); Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1 (2007).

75. Mondak & Smithey, *supra* note 19, at 1115–16.

76. *See* Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 14 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) ("Under conditions of the greatest stress—integrating schools, protecting criminals' rights, interjecting itself into all types of life-and-death questions, and even deciding a presidential election—the aggregate level of public confidence in the Court has remained largely unchanged."); Friedman, *supra* note 43, at 2626 (suggesting that "negative feelings" about the Supreme Court "have a fairly short half-life"); Mondak & Smithey, *supra* note 19, at 1115 (arguing that "an active and even controversial Court can enjoy strong, stable aggregate support").

Scholars offer a range of explanations for this phenomenon. Frederick Schauer argues that one factor is "the Court's own fostering of its trappings of neutrality and political disinterest. Robes. A grandiose building. Highly formal ritualized proceedings. Opinions written as if the results were the product of largely nonpolitical consultation of highly specialized knowledge not accessible to ordinary folk."[77] Jeffrey Mondak and Shannon Ishiyama Smithey add that "the Supreme Court benefits from a link to basic democratic values," which is "influenced by the tendency to view the Court as protector of the Constitution and champion of justice and civil liberties."[78] Our nation's schools first introduce these lessons early in childhood, and few institutions—or individuals—challenge them later in life.[79] Of course, the Justices themselves also play a key role in the Court's own success as an institution—often issuing decisions on high-salience issues that appeal to the American people and their political leaders.[80]

When assessing public support for the Supreme Court, Gregory Caldeira and James Gibson distinguish between two types of support: *specific support* and *diffuse support*.[81] Specific support refers to the mass public's response to the Court's rulings in particular cases and on particular issues.[82] Diffuse support speaks to the

77. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 57 (2006).

78. Mondak & Smithey, *supra* note 19, at 1123.

79. *See* Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 969 (2009).

80. *See generally* FRIEDMAN, *supra* note 22 (analyzing the relationship between public opinion and Supreme Court decisions over time); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006) (describing how the Supreme Court is often responsive to public opinion); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) (examining how the contours of public debates over the Equal Rights Amendment shaped the Court's approach to the Fourteenth Amendment and sex equality); Robert C. Post, *The Supreme Court 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (analyzing the relationship between constitutional culture and Supreme Court decision-making); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (describing how the Supreme Court nomination process keeps the Court in touch with public opinion).

81. Caldeira & Gibson, *supra* note 13, at 636–42.

82. *Id.* at 637. For examples of scholarship that analyzes the public's views about the Supreme Court, see PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (examining public opinion across a series of constitutional issues and Supreme Court cases) and Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011) (analyzing the public's views about constitutional interpretation, especially originalism).

public's general support for the Supreme Court as an institution.[83] As Caldeira and Gibson explain, diffuse support "refers to a 'reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.'"[84] Importantly, if the Supreme Court maintains a high enough level of diffuse support, "a citizen may well disagree with" a given ruling, "but nevertheless continue to concede [the Court's] legitimacy as a decision maker."[85]

Scholars often draw a connection between diffuse support, institutional legitimacy, and the dynamics of Supreme Court decision-making.[86] On this view, a Justice might turn away from her own best reading of the law, or her own substantive preferences, in order to curry favor with the American people and their political leaders—in the process, preserving the Court's institutional legitimacy, guarding against threats of political reprisal, and cultivating the individual Justice's own reputation among political leaders and the mass public.[87] With this dynamic, public opinion sets parameters for what the Court can do on high-salience issues.[88] If the Court stays within those parameters, it has a considerable amount of freedom to act.[89] If it strays from them, it loses public legitimacy and becomes vulnerable to criticism, political reprisal, and reputational harm.[90] As a result, some Justices avoid deciding cases—particularly on high-salience issues—in ways that diverge sharply from public opinion.[91]

Sometimes this requires a Justice to compromise legal fidelity or her own policy preferences.[92] Sometimes this drives her to sidestep controversial issues at the expense of minority rights.[93]

83. Caldeira & Gibson, *supra* note 13, at 637.

84. *Id.* at 637 (quoting DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965)).

85. *Id.*

86. Mondak, *supra* note 43, at 608 ("[T]he Supreme Court's institutional legitimacy enables the Court to elicit some degree of public acceptance of otherwise unpopular policy actions.").

87. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2254–58 (2019) (reviewing RICHARD H. FALLON, JR, LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

88. Klarman, *supra* note 39, at 17–18.

89. FRIEDMAN, *supra* note 22, at 4.

90. *Id.* at 383.

91. *See* Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Probably Yes (But We're Not Sure Why)*, 13 U. PA. CONST. L.J. 263, 277–79 (2010).

92. Grove, *supra* note 1, at 2261.

93. *Id.* at 2261–62.

Either way, when the Justices exercise forbearance—deciding against ideological type and building a cross-ideological consensus—the American people and their elected officials often celebrate them for their acts of institutional maintenance.[94]

2. Why the Justices Do What They Do: Legal Elites, Institutional Legitimacy, and the Inner Lives of the Justices

While the existing political science literature captures many important aspects of Supreme Court decision-making, Neal Devins and Lawrence Baum have recently written a powerful rejoinder.[95] To be clear, Devins and Baum agree with nearly all scholars that the Justices are often driven by a desire to push their own policy preferences, advance their own constitutional visions, and guard against the risk of political reprisal.[96] However, this is not all that the Justices value. Like most people, the Justices are also influenced by their own social identities and by the desire to "win approval from audiences that they care about."[97] And while Devins and Baum don't deny that mass opinion may have some influence on individual Justices,[98] they argue that the existing literature has overstated its importance.[99]

For Devins and Baum, the Justices overall (and especially Justices near the Court's ideological center) care most about the views of academics, elite practitioners, and Supreme Court commentators.[100] While most Americans ignore the Court's day-to-day actions, elite audiences are in a powerful position to shape the Justices' reputations—offering either gushing praise or stinging critiques in law reviews, in newspapers, in professional journals, at conferences, on blogs, on podcasts, and over social media.[101] For a Justice's current reputation, the Supreme Court

94. *See* Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx (showing a spike in the Roberts Court's approval rating after a series of surprising decisions featuring cross-ideological coalitions).

95. *See* DEVINS & BAUM, *supra* note 43; BAUM, *supra* note 43; Baum & Devins, *supra* note 43.

96. DEVINS & BAUM, *supra* note 43, at 10.

97. Baum & Devins, *supra* note 43, at 1516–17.

98. DEVINS & BAUM, *supra* note 43, at 10–11.

99. *Id.* at 9.

100. *See* DEVINS & BAUM, *supra* note 43, at 10–11; *see also* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 34 (2013).

101. Baum & Devins, *supra* note 43, at 1543.

press corps (including traditional journalists, online commentators, bloggers, and podcast hosts) may exert an outsized influence, as these voices attract a "wide audience[ ] among elite groups that are salient to the Justices."[102] At the same time, a Justice's long-term reputation often turns on how she is remembered by legal academics, as memorialized in casebooks, taught in law school classrooms, and explored in law review articles.[103]

Devins and Baum argue that a Justice's preferred audiences will shape her decision-making in important ways, sometimes pushing her to deviate from her best reading of the law or her own policy preferences in order to win favor with an influential reference group.[104] In certain circumstances, this dynamic may drive a Justice towards the mission of institutional maintenance. By preserving the Court's institutional legitimacy, a Justice may bolster her own reputation (and legacy) among key members of the legal elite, with this important audience of top-flight practitioners, Supreme Court commentators, and legal academics often celebrating Justices who signal through their opinions and their votes that they value the Court as an institution more than their own policy preferences.

Elite lawyers are the keepers of our nation's constitutional memory.[105] They shape judicial reputations, and, in the process, help build the constitutional canon.[106] Many Justices want to be remembered by later generations—and for the right reasons. For some, this is the allure of embracing the role of Supreme Court institution builder.

C. Action and Constraint: The Dynamics of Judicial Decision-Making

102. DEVINS & BAUM, *supra* note 43, at 44–45.

103. For examples of previous attempts to assess the reputation of Supreme Court Justices, see HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 5–7 (2008); WILLIAM DAVID BADER & ROY M. MERSKY, THE FIRST ONE HUNDRED EIGHT JUSTICES (2004); ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES (1978); Robert C. Bradley, *Who Are the Great Justices and What Criteria Did They Meet?*, *in* GREAT JUSTICES OF THE U.S. SUPREME COURT (William D. Pederson & Norman W. Provizer eds., 1993).

104. DEVINS & BAUM, *supra* note 43, at 147.

105. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 7 (2014).

106. For leading scholarship addressing the constructions of the constitutional canon and anticanon, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

and the Challenges of Tending to the Supreme Court's Legitimacy

In a powerful new book, Jack Balkin analyzes our current constitutional moment. Drawing on a blend of constitutional theory and political science, Balkin argues that our nation's constitutional politics is the story of *three* separate constitutional cycles: a cycle of rising and falling regimes, a cycle of polarization and depolarization, and a cycle of constitutional rot and renewal.[107] Together, these three patterns of constitutional change interact to "generate" (what he calls) "constitutional time."[108]

For Balkin, no single actor is responsible for our current moment, a moment characterized by a "crumbling . . . [political] regime," high levels of political polarization, and a constitutional system rotten to its core—not Donald Trump, not the Roberts Court, and not any single political party or social movement.[109] Furthermore, no single actor can save us from this moment's many pathologies—not even a politically insulated Supreme Court. On this view, while each Justice *does* have the power to shape her own legacy—through her votes, her opinions, and her relationships with her colleagues—no Justice can ever fully escape the constraints of constitutional time.[110] Sometimes a period's constitutional context empowers her.[111] Sometimes it constrains her.[112] Either way, the cycles of constitutional change shape her political power and define her decision-making options.[113]

Balkin's scholarship is a useful corrective for accounts that overemphasize the Court's power to transform our nation's constitutional politics, whether advanced by attitudinalists in political science departments,[114] constitutional theorists in law schools,[115] politicians on the campaign trail,[116] activists attacking the

107. BALKIN, *supra* note 9, at 4, 6 ("To understand what is going on today in the United States, we have to think in terms of political cycles that interact with each other and create remarkable—and dark—times.").

108. *Id.* at 6 (emphasis omitted).

109. *Id.* at 64.

110. *Id.* at 69–80, 112.

111. *Id.* at 85.

112. *Id.* at 86.

113. *Id.* at 81–96.

114. SEGAL & SPAETH, *supra* note 13, at 6–11.

115. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 132 (1978).

116. *See* ANDREW E. BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL: THE SURPRISING POLITICAL CAREER OF AMERICA'S FOUNDING DOCUMENT 1–14 (2007).

Court's most recent ruling,[117] or members of the general public reeling from our politics of polarization and constitutional rot.[118] At the same time, Balkin spends far too little time on what constitutional actors, including the Justices, might do at the individual level to navigate this difficult political environment. This is a mistake.

To capture the challenge of tending to the Supreme Court's legitimacy, scholars must strike the right balance between emphasizing individual action and structural constraint, the choices the Justices make, and the background forces that constrain those choices. While the existing literature offers scholars a helpful framework for understanding the factors driving the Supreme Court's legitimacy over time, much work remains to fill in the details of constitutional practice. In this Article, I make a start. Part of the answer turns on legal craft—the tools available to the individual Justice as she tends to the Supreme Court's legitimacy in concrete cases. However, part of it also requires adopting a regime perspective to ensure that a Justice's actions meet the challenges of her own constitutional moment. I consider each of these components, in turn.

II. CHIEF JUSTICE ROBERTS, SUPREME COURT LEGITIMACY, AND LEGAL CRAFT: A CASE STUDY IN CONSTITUTIONAL PRACTICE

Commentators must resist the urge to absolve the Justices of responsibility for the Supreme Court's legitimacy. While potent structural forces frame the Court's institutional challenges, the Justices themselves remain powerful actors within our constitutional system.[119] They serve for life.[120] They don't have to worry about reelection.[121] They remain among our nation's most respected public officials.[122] They rarely face serious court-curbing threats.[123] And they hold real formal power.[124]

117. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 240 (2004).

118. BALKIN, *supra* note 9, at 63.

119. Grove, *supra* note 1, at 2243; Lee, *supra* note 3, at 273.

120. *See* THE FEDERALIST NO. 79, at 267 (Alexander Hamilton) (McLean's ed., 1788) (describing federal judges who "behave properly" as "secured in their places for life").

121. BICKEL, *supra* note 50, at 19.

122. *See* McCarthy, *supra* note 94.

123. FALLON, *supra* note 26, at 157.

124. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Given their political insulation, public prestige, and practical authority, the Justices *can* decide cases and craft opinions in ways that promote the Court's institutional legitimacy. Or not. It's up to them, both individually and institutionally. But what *can* the individual Justice do in concrete cases? What specific tools does she have at her disposal? And what are the tradeoffs involved in adopting different approaches to legal craft? Abstract advice and theoretical musings won't do. Moving forward, scholars must address issues of constitutional practice.

For those Justices interested in preserving the Court's institutional legitimacy, they might begin—as I do in this Part—by studying the track record of Chief Justice Roberts. Since the beginning of his tenure on the Supreme Court, Roberts has framed his own mission as defined by certain institutionalist virtues. In an early interview with Jeffrey Rosen, the Chief Justice explained, "[T]he Court is . . . ripe for a . . . refocus on functioning as an institution, because if it doesn't it's going to lose its credibility and legitimacy . . . ."[125] Since then, Roberts has often spoken about how important it is for the Justices to stay above politics and protect the Court's institutional reputation.[126]

Of course, Roberts has both written and joined muscular decisions that divided the Justices along ideological lines.[127] No Justice passes the test of institutionalist leadership in all cases and for all time. Even so, Roberts's words—and, in many cases, his actions—suggest a certain institutionalist instinct.

In this Part, I use Chief Justice Roberts's tenure on the Supreme Court as a case study for how an individual Justice might tend to the Court's institutional legitimacy as a matter of legal craft, analyzing the tools that Roberts employs in concrete cases to pursue his institutionalist mission. These tools include coalition building, calls for action by the elected branches, incrementalism, charity for the opposing side, triangulating between constitutional extremes, and promoting an image of institutional humility.

125. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/.

126. *See* Adam Liptak, *Politics Has No Place at the Supreme Court, Chief Justice Roberts Says*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/us/politics/chief-justice-john-roberts-interview.html.

127. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

My goal is *not* to provide a comprehensive account of the Chief Justice's track record as an institutionalist or to offer a full-throated defense (or critique) of his tenure. Instead, I seek to use illustrative examples to show the various ways in which the Chief Justice has promoted the practice (and appearance) of institutionalist leadership on today's Court and explore the lessons that the Chief Justice's tenure might teach us about the practical challenges of exercising this sort of leadership in a polarized age.

Scholars and commentators often call on the Chief Justice to tend to the Court's institutional legitimacy.[128] This is how he does it.

A. Coalition Building

Perhaps *the* central institutionalist virtue is successful coalition building. To protect the Supreme Court's reputation, it's essential for the Justices to maintain the Court's image as a legal institution—not one that's doing mere partisan politics.[129] This is central to the Chief Justice's stated mission.[130]

While *National Federation of Independent Businesses* (NFIB) *v. Sebelius* is Roberts's most famous example of coalition building—with the Chief Justice joining with his progressive colleagues to protect the core of the Affordable Care Act (ACA) against an important constitutional challenge[131]—he has managed to build cross-ideological coalitions in a string of important cases. Roughly speaking, these cases fall into three different categories.

First, as with *NFIB*, Roberts delights in building coalitions on both sides of a single high-profile case, confounding efforts to categorize his moves as either conservative or progressive. Take *Department of Commerce v. New York*.[132] There, the Court considered a challenge to the Trump Administration's effort to add a citizenship question to the U.S. Census.[133] The Court split on both

128. *See, e.g.*, Greenhouse, *supra* note 22; Totenberg, *supra* note 22; Lithwick & Stern, *supra* note 22; Liptak, *supra* note 22; Michael O'Donnell, *John Roberts's Biggest Test Is Yet to Come*, ATLANTIC (Mar. 2019), https://www.theatlantic.com/magazine/archive/2019/03/john-roberts-biography-review/580453/; Jeffrey Rosen, *Big Chief*, NEW REPUBLIC (July 12, 2012), https://newrepublic.com/article/104898/john-roberts-supreme-court-aca.

129. FALLON, *supra* note 26, at 35–41.

130. Rosen, *supra* note 125.

131. *See* NFIB v. Sebelius, 567 U.S. 519 (2012) (building three separate coalitions—two cross-ideological and one ideological—in an important constitutional challenge to the Affordable Care Act).

132. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

133. *Id.* at 2561.

the substantive reading of the Constitution's Enumeration Clause *and* the case's practical outcome.[134] Roberts commanded the majority on both fronts. On the one hand, Roberts joined with his conservative colleagues to uphold the executive branch's authority to ask a citizenship question under the Enumeration Clause.[135] On the other hand, he joined with his progressive colleagues to uphold the district court's conclusion that the Commerce Department's official explanation was a mere pretext.[136] By offering a partial victory to each side, Roberts resisted simple ideological characterization—preserving the government's authority to ask the question, while also removing the citizenship question for now.

Second, Roberts tries to build majorities that blur ideological divisions and expand beyond bare five-to-four coalitions—especially when these moves lead to decisions that defy expectations. This move is especially powerful when applied to a range of high-profile cases within a single Term.[137]

For instance, consider October Term 2019. There, Chief Justice Roberts and his colleagues faced one of the most challenging and consequential lineups in recent memory, with blockbuster cases on abortion, immigration, LGBTQ rights, religious liberty, President Trump's financial records, and the mechanics of the Electoral College.[138] Furthermore, the Justices had to decide these closely

134. *Id.* at 2576, 2584–85.

135. *Id.* at 2566.

136. *Id.* at 2573-76.

137. Chief Justice Roberts has also built cross-ideological coalitions in cases covering a single issue-area across multiple Terms. For instance, he has forged cross-ideological coalitions in one of the fastest-moving areas in the Court's jurisprudence: digital privacy. *See* Carpenter v. United States, 138 S. Ct. 2206 (2018) (joining the Court's progressives to challenge the government's attempt to secure a defendant's cell-site records without a warrant); Riley v. California, 575 U.S. 373 (2014) (leading a unanimous Court to require a warrant before the police may search the digital information on a cell phone seized from an arrestee). Most famously, he has built multiple coalitions to save the core of the Affordable Care Act (ACA). *See* King v. Burwell, 135 S. Ct. 2480, 2485 (2015) (rejecting a statutory challenge (with constitutional undertones) that would have undermined the ACA's health care exchanges in a six-to-three ruling that attracted the vote of one of the *NFIB* dissenters, Justice Anthony Kennedy); NFIB v. Sebelius, 567 U.S. 519, 519 (building various cross-ideological coalitions to save the core of the ACA in the heat of an election year).

138. *See, e.g.*, Robert Barnes, *With Wave of Major Rulings, Roberts and Supreme Court Emerge as Powerful Counterweight to Trump and Congress*, WASH. POST (July 10, 2020), https://www.washingtonpost.com/politics/2020/07/10/with-wave-major-rulings-roberts-supreme-court-emerge-powerful-counterweight-trump-congress/; Adam Liptak & Alicia Parlapiano, *The Supreme Court Aligned with Public Opinion in Most Major Cases This Term*, N.Y. TIMES (July 9, 2020) https://www.nytimes.com/interactive/2020/06/15/us/supreme-court-major-cases-2020.html.

watched cases in the middle of an election year featuring a polarizing President and two of the biggest crises in recent memory: a deadly pandemic and an economic meltdown. While many commentators anticipated a conservative rout, the Court went on to issue a string of surprising rulings in many of the Term's blockbuster cases—a mix of both conservative *and* progressive victories, with many featuring cross-ideological coalitions.[139]

After the Term, the Chief Justice received much of the praise for these rulings, and it's easy to see why.[140] As the Court's median Justice, Roberts held the pivotal vote in most cases.[141] And as the Court's Chief Justice, he decided who should speak for the Court when he was in the majority—which was in nearly every case.[142] Many commentators concluded that Roberts used these powers to forge a politics of compromise.[143] Sometimes the Chief Justice built cross-ideological coalitions that extended beyond a bare majority—on LGBTQ rights, religious liberty, the Electoral College, and President Trump's financial records.[144] Other times he defected from his conservative colleagues and provided the crucial fifth vote to the Court's progressives on abortion, immigration, and California's coronavirus response.[145]

Of course, the Court *did* sometimes divide along ideological lines; for instance, on vouchers for religious schools, the President's control over the Consumer Financial Protection Bureau, and challenges to various states' restrictive voting laws.[146] Even so, for many commentators, October Term 2019 was a clear example of the Chief Justice exercising constitutional leadership—brokering

139. *See, e.g.*, Joan Biskupic, *Chief Justice Roberts Gave Everyone Something to Call a Win*, CNN (July 9, 2020, 4:55 PM), https://www.cnn.com/2020/07/09/politics/john-roberts-supreme-court/index.html.

140. *See, e.g.*, Rosen, *supra* note 22.

141. Martin et al., *supra* note 10, at 1275–76.

142. *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 81–85 (1964).

143. *See, e.g.*, Jonathan Adler, *This Is the Real John Roberts*, N.Y. TIMES (July 7, 2020), https://www.nytimes.com/2020/07/07/opinion/john-roberts-supreme-court.html.

144. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020); Chiafalo v. Washington, 140 S. Ct. 2316, 2319 (2020); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372 (2020); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020); Trump v. Mazars USA, 140 S. Ct. 2019, 2026 (2020); Trump v. Vance, 140 S. Ct. 2412, 2420 (2020).

145. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

146. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020); Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

compromises between his colleagues, avoiding ideological rulings whenever possible, and realizing his vision of a Court standing above partisan politics.[147]

Third, the Chief Justice deftly managed a Court legitimacy crisis during the Senate battle over President Obama's nomination of Merrick Garland. With an eight-Justice Court, Roberts worked with his colleagues to carry on with the Court's business and avoid embarrassing four-to-four deadlocks. The Chief Justice didn't always succeed,[148] but perhaps the Court's most notable effort was in *Zubik v. Burwell*, a high-profile challenge to the ACA's contraception mandate.[149] There, the Court ordered supplemental briefing after oral argument to assess the possibility of issuing a decision that avoided reaching the case's merits. The Court asked both parties to address whether an insurance company might provide contraceptive coverage to the challengers' employees without involving the challengers directly in the process.[150] Both sides confirmed that this option was "feasible."[151] Roberts and his colleagues then issued a per curiam opinion, sending the case back to the lower courts for further consideration and avoiding a four-to-four split in one of the Term's most closely watched cases.[152]

In the end, Chief Justice Roberts has, of course, written and joined aggressive opinions issued by conservative (bare) majorities.[153] Even so, Roberts has shown an institutionalist instinct to reach out for consensus.

147. *See, e.g.*, Richard Wolf, *Aligning with Liberals on DACA and LGBTQ Rights, Chief Justice John Roberts Asserts His Independence*, USA TODAY (June 19, 2020, 5:00 AM), https://www.usatoday.com/story/news/politics/2020/06/19/daca-lgbtq-chief-justice-john-roberts-displays-independent-streak/3216259001/.

148. *See, e.g.*, Friedrichs v. Cal. Tchrs. Ass'n, 136 S. Ct. 1083 (2016) (dividing four-to-four in a high-profile First Amendment case involving public sector union fees); United States v. Texas, 136 S. Ct. 2271 (2016) (dividing four-to-four over a case involving an important Obama Administration immigration policy).

149. Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam).

150. *Id.* at 1559–60.

151. *Id.* at 1560.

152. *Id.* at 1561. Importantly, this compromise largely held last Term in *Little Sisters of the Poor*—a seven-to-two ruling, with Justices Breyer and Kagan joining the Court's conservatives. 140 S. Ct. 2367, 2367 (2020). There, the Court rejected challenges by states to Trump Administration rules allowing private employers to opt out of the ACA's contraception mandate for religious or moral reasons. *Id.* at 2372–75.

153. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

B. Calls for Action by the Elected Branches

One of the Chief Justice's favorite moves—especially when authoring a muscular decision for the Court's conservative majority—is to call on Congress (or other political actors) to remedy any adverse consequences arising from the Court's ruling. A pose of judicial modesty, this move is often designed to address concerns about the counter-majoritarian difficulty, blunt substantive attacks from a progressive dissent, and anticipate criticisms from both elite audiences and the mass public.[154]

For instance, consider *Rucho v. Common Cause*, the Court's landmark partisan gerrymandering decision.[155] There, the Chief Justice wrote a majority opinion for the Court's conservatives, concluding that partisan gerrymandering claims were nonjusticiable.[156] This decision shut down further litigation in the federal courts and closed off a constitutional debate that extended (at least) as far back as the Court's 2004 decision in *Vieth v. Jubelirer*.[157] While some commentators defended the Chief Justice's opinion as an act of constitutional forbearance, many criticized it for blocking the most effective venue for reform, thereby replacing (possible) action by life-tenured judges with (probable) obstruction by self-interested politicians.[158]

Anticipating this criticism, Roberts highlighted a range of successful reform efforts in the states and emphasized the various pathways still available to future reformers. For instance, at the state level, reformers might continue to push for proposals to shift redistricting decisions to an independent commission, create an office of "state demographer" tasked with drawing district lines, or craft new statutory (or constitutional) language offering a precise definition of partisan gerrymandering for state courts to apply to

154. *See* LESSIG, *supra* note 42, at 17; BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 50, at 41; Cass R. Sunstein, *If the People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 158–59 (2007); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

155. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

156. *Id.* at 2508.

157. Vieth v. Jubelirer, 541 U.S. 267 (2004).

158. *See, e.g.*, *Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting) (explaining that the "harms" of partisan gerrymandering "arise because politicians want to stay in office" and arguing that, therefore, "[n]o one can look to them for effective relief"); Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html (highlighting the range of reactions to the *Rucho* decision).

challenges brought under state law.[159] Depending on the state, reformers might look to the state legislature, the state's voters, or both in their efforts for reform.

Roberts also emphasized Congress's power to attack partisan gerrymandering under the Constitution's Elections Clause by describing past congressional efforts to address the problem and even highlighting a recent Democratic House bill that would "ban partisan gerrymandering" nationwide and "require States to create 15-member independent [redistricting] commissions . . . ."[160] While Roberts "express[ed] no view" on the constitutionality of any particular proposal, he explained that "the avenue for reform established by the Framers, and used by Congress in the past, remains open" even after the *Rucho* decision.[161]

In the end, the Chief Justice frequently invites the elected branches to respond to his rulings.[162] Critics dismiss this move as a cynical ploy—with the Chief Justice striking a pose of modesty while still pushing his own substantive agenda.[163] In our polarized world, the elected branches—especially Congress—rarely act.[164] Because of the various veto points in our political system, each party struggles to build a working majority in the elected branches, even when it manages to win the presidency and majorities in both the House and the Senate.[165] As a result, congressional responses to Supreme Court decisions are vanishingly rare.[166]

159. *Rucho*, 139 S. Ct. at 2507–08.

160. *Id.* at 2508.

161. *Id.*

162. The examples are numerous. *See, e.g.*, Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) ("Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the [Consumer Financial Protection Bureau] into a multimember agency."); McCutcheon v. FEC, 572 U.S. 185, 223 (2014) (striking down aggregate campaign contribution limits, but highlighting "multiple alternatives available to Congress that would serve the Government's . . . interest, while avoiding 'unnecessary abridgment' of First Amendment rights"); Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (concluding that the Voting Rights Act's coverage formula was outdated and unconstitutional but explaining that "Congress may draft another formula based on current conditions").

163. *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015) (describing the Court's decision in *Shelby County* as "mark[ing] the death of the VRA as a superstatute").

164. Lee, *supra* note 3, at 274.

165. *See* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 1–20 (1998).

166. *See generally* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013) (describing how the rise in polarization has made it difficult for Congress to pass legislation that responds to Supreme Court decisions).

On this view, in a case like *Rucho*, Roberts, the politically savvy Chief Justice, knew that the Republican Senate wouldn't take up the Democratic House's election reform bill. And yet, he used the rhetoric of interbranch dialogue anyway, reaping both the rhetorical gains of a conciliatory tone *and* the practical benefits of increased Supreme Court power in an age of gridlock.

Even so, this move, whether sincere or merely rhetorical, is still a key tactic available to the institutionalist Justice. Viewed charitably—and used within a well-functioning political system—it remains one way for the Court to offer constructive suggestions to the elected branches and promote constitutional dialogue between the Court and key political actors.[167]

C. Incrementalism

When looking to reshape the law, Chief Justice Roberts prefers to move incrementally. Even in areas where Roberts has pushed the law in a new direction, he has tended to prefer a slower approach than many of his colleagues, with seismic shifts coming only after the legal groundwork has already been prepared by previous—more modest—decisions. By shifting the law incrementally, the institutionalist Justice prepares key audiences for constitutional change, thereby satisfying craft virtues that appeal to legal elites, providing the elected branches with the opportunity to act preemptively, and avoiding abrupt shifts that might spur public backlash.[168]

This is one way of understanding the Chief Justice's approach in *Shelby County v. Holder*.[169] There, Roberts's opinion for the Court's conservative majority gutted one of the nation's most celebrated laws: the Voting Rights Act of 1965 (VRA). However, the Chief Justice set the foundation for this muscular decision four years earlier in *Northwest Austin Municipal Utility District Number One* (NAMUDNO) *v. Holder*, a separate challenge to the VRA.[170]

167. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655–58, 668–80 (1993).

168. *See* KLARMAN, *supra* note 29, at 464; David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859–60 (2009); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATION 13, 16 (1990).

169. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

170. Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009) [hereinafter NAMUDNO].

Under the VRA's preclearance requirement, certain jurisdictions must submit proposed election law revisions to the national government for approval before those laws may go into effect.[171] The VRA includes a coverage formula for determining which jurisdictions must satisfy this requirement, but this formula is based on data covering voting rights abuses from over three decades ago.[172] Prior to *NAMUDNO*, the VRA's critics had long argued that the continued use of this formula and its old data to determine the reach of the VRA's preclearance requirement was unconstitutional.[173]

In *NAMUDNO*, the Chief Justice wrote the majority opinion for seven of his colleagues, dodging the constitutional question.[174] While Roberts expressed concerns about the VRA's constitutionality—especially in light of improved conditions in the South—he relied on constitutional avoidance to offer a strained reading of the statute, allowing a municipal utility district in Texas to bail out of the VRA's preclearance requirement.[175] In short, the Chief Justice was able to forge an unlikely coalition in a closely watched case to avoid reaching the merits of a constitutional challenge to the VRA, getting credit for his leadership while preparing the legal groundwork for *Shelby County*.

Fast-forward four years to *Shelby County* itself. There, Roberts began his majority opinion for the Court's conservatives by striking a modest pose, acknowledging that invalidating "an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'"[176] He then gestured to the cross-ideological ruling in *NAMUDNO*, explaining, "That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the [VRA]."[177] Finally, Roberts chided Congress for failing to act, arguing that the Court's hands were tied: "Congress could have updated the

171. *See id.* at 198.

172. *Id.* at 203.

173. *See* Brief for Pac. Legal Found., Ctr. for Equal Opportunity, and Project 21 as Amicus Curiae of Supporting Appellant, *NAMUDNO*, 557 U.S. 193 (2009) (No. 08-332), 2009 WL 526207, at *19.

174. *NAMUDNO*, 557 U.S. at 193.

175. *Id.* at 203.

176. Shelby Cnty. v. Holder, 570 U.S. 529, 556 (citation omitted).

177. *Id.* at 556–57.

coverage formula . . ., but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) [defining the VRA's coverage formula] unconstitutional."[178]

In addition, Roberts sometimes looks to cabin—rather than overrule—problematic precedent, using his opinions to declare broad principles without casting aside or unsettling well-established constitutional doctrine. For instance, consider *Seila Law v. Consumer Financial Protection Bureau*.[179]

In response to the Great Recession, Congress established the Consumer Financial Protection Bureau (CFPB), an independent agency responsible for promoting consumer protection in the financial industry.[180] Traditionally, Congress structured independent agencies around multimember boards.[181] However, rather than following this historical practice, Congress delegated the CFPB's broad authority to a single Director—nominated by the President, confirmed by the Senate for a five-year term, and removeable only for "inefficiency, neglect of duty, or malfeasance in office."[182]

The challengers argued that the CFPB's novel structure—an agency with broad powers led by a single Director insulated from presidential removal—violated the Constitution's separation of powers.[183] The Supreme Court agreed, in a five-to-four decision dividing the Court along ideological lines.[184] In his majority opinion, the Chief Justice advanced a broad vision of presidential power. For Roberts, the President's removal power is essential to Article II's overall structure, empowering the President to supervise executive-branch officials and ensure that the laws are "faithfully executed."[185] In Roberts's view, the Founding generation wrote this vision into the Constitution.[186] The First Congress and its

178. *Id.* at 557. The Roberts Court made a similar move on the issue of public sector union fees. *See generally* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); Harris v. Quinn, 573 U.S. 616 (2014).

179. Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2183 (2020).

180. *Id.* at 2191.

181. *Id.*

182. *Id.* at 2193 (quoting 12 U.S.C. §§ 5491(c)(1), (3)).

183. *Id.* at 2192.

184. *Id.* at 2190–92.

185. U.S. CONST. art. II, § 3; *Seila Law*, 140 S. Ct. at 2191.

186. *Seila Law*, 140 S. Ct. at 2191.

successors confirmed it in practice.[187] And Chief Justice Taft weaved it into constitutional doctrine.[188]

Of course, this is only part of the story. Prior to *Seila Law*, the Supreme Court had already upheld previous congressional efforts to insulate *both* agencies *and* individual officials from presidential supervision.[189] In her dissent, Justice Kagan read these previous rulings broadly—upholding the CFPB's structure and arguing that Congress had considerable authority to limit the President's removal powers.[190] In contrast, Roberts framed these same rulings narrowly—not as broad grants of power to Congress, but instead as narrow exceptions to the general rule: a broad presidential removal power.[191] While Roberts expressed no interest in overruling longstanding precedent or challenging the constitutionality of well-established agencies, he also refused to extend these rulings to cover a powerful new one with "no foothold in history or tradition."[192]

In short, Roberts's *Seila Law* opinion offered a blend of boldness and restraint. He invalidated the CFPB's structure—making its Director removeable at-will by the President.[193] He offered a broad vision of presidential power. And he trimmed back on Congress's authority to limit the President's ability to supervise the executive branch. At the same time, he limited his ruling's doctrinal sweep (and its practical consequences)—refusing to overrule precedent, question the constitutionality of old agencies, or dismantle the CFPB itself. While Roberts's opinion increased the President's power to supervise the agency, it preserved the CFPB's broad authority to protect consumers.[194]

In the end, incrementalism need not entail substantive modesty. To his critics, Roberts may move more slowly than his conservative

187. *Id.*

188. *See* Myers v. United States, 272 U.S. 52 (1926).

189. *See* Morrison v. Olson, 487 U.S. 654 (1988) (upholding the Independent Counsel Act); Humphrey v. United States, 295 U.S. 602 (1935) (upholding the Federal Trade Commission).

190. *Seila Law*, 140 S. Ct. at 2224–25 (Kagan, J., concurring in the judgment and dissenting in part).

191. *Id.* at 2206 (majority opinion) (refusing to read *Humphrey* as "a freestanding invitation for Congress to impose additional restrictions on the President's removal authority").

192. *Id.* at 2202. The Court made a similar move a decade earlier. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

193. *Seila Law*, 140 S. Ct. at 2191.

194. *Id.* at 2210–11.

colleagues, but he still pursues an ambitious agenda. Sometimes he attacks landmark statutes.[195] Sometimes he cabins well-established doctrine.[196] And sometimes he patiently shifts the law—beginning with modest rulings that attract cross-ideological coalitions and ending with five-to-four decisions that reshape the law in the Chief Justice's own image.[197] Even so, Roberts has often signaled a preference for moving more slowly than many of his colleagues—and in the process, promoting certain institutionalist virtues.

D. Charity for the Opposing Side

The institutionalist Justice understands that she must sometimes reach conclusions that divide the American people—and even the Justices themselves. However, when weighing in on hot-button issues, she often signals respect for reasonable arguments on all sides—and especially those offered by the *opposing* side.[198] While Chief Justice Roberts is not shy about using sharp rhetoric, he sometimes practices this institutionalist virtue.

For instance, consider the Chief Justice's dissent in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[199] There, the Roberts Court agreed to block an executive order issued by the New York Governor limiting attendance at religious services during the coronavirus pandemic.[200] This was the Roberts Court's first coronavirus case following the confirmation of Justice Amy Coney Barrett. It addressed an important (and controversial) topic—one that split the American people along partisan lines.[201] Furthermore, it divided the Justices themselves, yielding *three* separate dissents—authored by Chief Justice Roberts, Justice Breyer, and Justice

195. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

196. *Seila Law*, 140 S. Ct. at 2192.

197. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2246 (2020) (issuing a five-to-four decision along ideological lines—building on *Trinity Lutheran* to strike down a Montana law banning the use of school vouchers for private religious schools); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2037 (2017) (building a seven-to-two majority to strike down a law banning public funds to a religious institution for playground supplies).

198. Siegel, *supra* note 20, at 969.

199. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

200. *Id.* at 66.

201. *See* Lydia Saad, *Americans Less Amenable to Another COVID-19 Lockdown*, GALLUP (Nov. 11, 2020, 7:52 PM), https://news.gallup.com/poll/324146/americans-less-amenable-covid-lockdown.aspx (showing declining public support for coronavirus restrictions, with sharp divisions by party identification).

Sotomayor.[202] In turn, Justice Gorsuch responded with a biting concurrence—accusing his dissenting colleagues of "disregard[ing] the First Amendment in times of crisis."[203]

In contrast, the Chief Justice approached each side of this case with a charitable spirit. Roberts began by recognizing that the Governor's order "raise[d] serious concerns under the Constitution"—signaling his agreement with the majority on the merits.[204] Even as he dissented in *Cuomo* itself for technical reasons, the Chief Justice shared the majority's view that the New York order was distinguishable from earlier ones upheld by the Court and acknowledged that he might strike a "different" balance "than the other dissenting Justices" in future coronavirus challenges—giving great weight to the religious liberty interests implicated by these cases.[205]

Even so, Roberts defended the good-faith arguments advanced by his progressive colleagues—challenging Gorsuch's mocking tone and his blistering critique:

> To be clear, I do not regard my dissenting colleagues as "cutting the Constitution loose during a pandemic," yielding to "a particular judicial impulse to stay out of the way in times of crisis," or "shelter[ing] in place when the Constitution is under attack." . . . They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.[206]

In Roberts's view, *Cuomo* raised difficult constitutional issues—with reasonable arguments on *all* sides. As a result, the case called for charity—not vitriol.

The Chief Justice has taken a similar approach when addressing opposing views advanced by various parties in important cases. For instance, take the Chief Justice's dissent in *Obergefell v. Hodges*. There, the Court issued a ruling striking down same-sex marriage bans in states throughout the country.[207] While Roberts challenged the majority's constitutional conclusions in the case, he also

202. *See Cuomo*, 141 S. Ct. at 75 (Roberts, C.J., dissenting); *id.* at 76 (Breyer, J., dissenting) (issuing a dissent joined by Justices Sotomayor and Kagan); *id.* at 78 (Sotomayor, J., dissenting) (issuing a dissent joined by Justice Kagan).

203. *Id.* at 69 (Gorsuch, J., concurring).

204. *Id.* at 75 (Roberts, C.J., dissenting).

205. *Id.*

206. *Id.* (quoting *id.* at 70–71 (Gorsuch, J., concurring)).

207. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

signaled respect for the LGBTQ community and its supporters. To that end, he acknowledged the appeal of marriage equality as a matter of policy.[208] He conceded the power of many of the personal narratives driving the majority's decision.[209] And he urged the winners to celebrate the case's practical outcome.[210] In the end, Roberts's approach was in sharp contrast with Justice Scalia's harsh rhetoric in earlier LGBTQ rights cases.[211]

The Chief Justice also showed charity towards the losing side in *NFIB v. Sebelius*. Even as Roberts voted to uphold the ACA's individual mandate, he kept faith with many of the constitutional objections raised by the ACA's conservative critics. Of course, he even reached out to decide the Commerce Clause issue in their favor—drawing fire from the Court's progressives and raising questions among many commentators about his commitment to legal craft.[212]

To signal agreement with the ACA's critics, Roberts drew on many familiar arguments from the public debates over the landmark statute. He highlighted the ACA's physical length—observing that its "10 titles stretch[ed] over 900 pages and contain[ed] hundreds of provisions."[213] He emphasized the ACA's practical effects, explaining that the individual mandate would force "healthy, often young adults" to purchase health insurance against their will (and, perhaps, against their interests).[214] And he even offered a version of the critics' (in)famous "broccoli" argument—by far *the* most popular criticism of the ACA from a constitutional perspective.[215]

208. *Id.* at 686 (Roberts, C.J., dissenting) ("Petitioners make strong arguments rooted in social policy and considerations of fairness.").

209. *Id.* at 699 ("[T]he compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry.").

210. *Id.* at 687 ("Many people will rejoice at this decision, and I begrudge none their celebration.").

211. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is part of a law-profession culture, that has largely signed on to the so-called homosexual agenda.").

212. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 624 n.12 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part) ("I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.").

213. *Id.* at 538–39.

214. *Id.* at 556 (explaining that young people "are less likely to need significant health care").

215. *See id.* at 554 ("Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables."); Mark D. Rosen & Christopher W.

Importantly, the Chief Justice also signaled respect for many of the substantive constitutional claims underlying the critics' public arguments—celebrating the importance of federalism, emphasizing the limits on the national government's power, and expressing sympathy for the conservative legal movement's push to trim back on the excesses of the New Deal Revolution.[216] He echoed conservative claims that the ACA represented an "unprecedented" expansion of national power.[217] And he even expressed agreement with the challengers' reading of the ACA's text itself.[218]

Of course, the challengers still lost both of these cases. Expressions of charity aside, the Chief Justice *did* reject the LGBTQ community's attempt to lay claim to the Constitution in *Obergefell*—reducing their constitutional claims to mere policy preferences.[219] And he *did* protect the ACA's most controversial feature, its individual mandate—granting the challengers a moral victory, but not a substantive win on policy.[220]

To Roberts's critics (and, of course, to the challengers in these cases), it's easy to see how the Chief Justice's expressions of charity may ring hollow—or, even worse, sound patronizing. Even so, Roberts *did* retain a charitable spirit in each of these cases—

Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 U.C.L.A. L. REV. 66 (2013) (exploring the power of the "broccoli" argument in public discourse).

216. *See NFIB*, 567 U.S. at 533 ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."); *id.* at 538 ("Our deference in matters of policy cannot . . . become abdication in matters of law."); *id.* at 557 ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent."). For an influential example of this new-wave libertarian scholarship, see Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010).

217. *NFIB*, 567 U.S. at 549 ("Congress has never attempted to rely on [the Commerce Power] . . . to purchase an unwanted product.").

218. *Id.* at 562.

219. *See* Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting). This move is especially problematic because the *Obergefell* challengers *did* have powerful constitutional arguments on their side, rooted in the Constitution's text and history. *See generally* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016) (offering an originalist argument that same-sex marriage bans are unconstitutional).

220. *NFIB*, 567 U.S. at 563; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2408, 2417, 2417–19, 2423 (2018) (upholding President Trump's travel ban, but also showing charity for the losing side by quoting President Trump's anti-Muslim statements, contrasting them with famous presidential speeches on religious tolerance, and attacking *Korematsu v. United States*).

signaling respect for all sides even as he decided cases addressing some of our nation's most divisive constitutional issues.[221]

E. Triangulating Between Constitutional Extremes

When deciding concrete cases, Chief Justice Roberts often triangulates between constitutional extremes. Sometimes Roberts uses this approach to shape public perceptions about his own aggressive rulings, using the extreme positions of his conservative colleagues to frame his chosen approach as a moderate alternative.[222] Other times the Chief Justice crafts solutions that attract support from both conservative and progressive Justices—charting a middle path between the assertive arguments advanced by each party in a single case. For example, consider the Court's recent decisions addressing President Trump's financial records—*Trump v. Vance* and *Trump v. Mazars USA*.[223]

There, the President challenged subpoenas issued by a New York grand jury and three congressional committees.[224] These cases raised vexing—and novel—constitutional questions, calling on the Court to weigh important interests (and serious consequences) on all sides.[225] While President Trump advanced broad claims of presidential immunity, both Congress and the New York District Attorney tied their subpoenas to core institutional powers—namely, Congress's power to legislate and a grand jury's power to conduct criminal investigations.[226]

221. Siegel, *supra* note 20, at 969.

222. *See, e.g.*, Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2210–11 (2020) (using severability—and a separate opinion written by Justice Thomas taking a more aggressive position—to frame Roberts's majority opinion in an ideologically divisive ruling as a moderate approach); McCutcheon v. FEC, 572 U.S. 185, 232 (2014) (Thomas, J., concurring in the judgment) (criticizing the Chief Justice's approach to *McCutcheon* as "yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment"). *But see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down school desegregation plans and fracturing the Court along ideological lines—and further dividing the conservative wing, with Justice Kennedy staking out a more moderate position than the Chief Justice).

223. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020); Trump v. Vance, 140 S. Ct. 2412 (2020).

224. *See Mazars*, 140 S. Ct. at 2026; *Vance*, 140 S. Ct. at 2420.

225. *See Mazars*, 140 S. Ct. at 2031 ("From President Washington until now, we have never considered a dispute over a congressional subpoena for the President's records."); *Vance*, 140 S. Ct. at 2424–25 (noting that this was the first time the Supreme Court was asked to decide whether the President must respond to state criminal subpoenas).

226. *See Mazars*, 140 S. Ct. at 2031; *Vance*, 140 S. Ct. at 2420.

Furthermore, each side made aggressive constitutional arguments advancing their own institutional interests—in the process, threatening a number of key principles, including federalism and the separation of powers. Taken to the extreme, President Trump's claims risked placing the President above the law.[227] District Attorney Vance's arguments threatened to empower popularly elected (and partisan) prosecutors to harass a President from the opposing party.[228] And Congress's broad assertions of both legislative and investigatory power risked gifting congressional committees a decisive advantage over the President in future separation-of-powers battles.[229] In both *Vance* and *Mazars*, Roberts staked out a position that triangulated between these extremes. Importantly, he also built cross-ideological coalitions committed to this approach—even attracting the votes of President Trump's two appointees at the time, Justices Gorsuch and Kavanaugh.

In *Vance*, the Chief Justice demonstrated the power of constitutional framing. Rather than addressing whether the President had to turn over his financial records to a New York grand jury, Roberts focused squarely on the President's broad assertion of absolute immunity from state criminal investigation—using the President's extreme position as a helpful constitutional foil.[230] While the Justices divided over some of the case's constitutional specifics, all nine Justices—including the two dissenters, Justices Alito and Thomas—rejected the President's aggressive claim of absolute immunity.[231] From there, Roberts built a cross-ideological coalition around an opinion that blended a healthy dose of John Marshall (and the famous Burr treason trial), two centuries of presidential practice, and the constitutional vision advanced in canonical cases like *United States v. Nixon*.[232] In the end, this coalition embraced a broad constitutional principle: "In our

227. *See Mazars*, 140 S. Ct. at 2033; *Vance*, 140 S. Ct. at 2420.

228. *Vance*, 140 S. Ct. at 2428 ("[H]arassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive.").

229. *Mazars*, 140 S. Ct. at 2026 ("The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority.").

230. *Vance*, 140 S. Ct. at 2420 ("We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.").

231. *Id.* at 2429.

232. *Id.* at 2425.

judicial system, '[t]he public has a right to every man's'"—including the President's—"'evidence'"[233]

Turning to *Mazars*, the Chief Justice wrestled with the challenge of setting new separation-of-powers baselines in a polarized era of non-stop constitutional hardball.[234] In the past, the elected branches—and opposing parties—settled their disputes without turning to the courts, each side using its institutional powers to reach an uneasy (and often bitter) compromise.[235] Roberts even detailed some recent examples—using the stories of Presidents from both parties to highlight this historical practice.[236] The political battles weren't pretty, but the elected branches resolved them on their own—without recourse to the courts.[237] Not anymore.[238]

In response, the Chief Justice charted a path between the extreme positions advanced by *both* the President *and* Congress.[239] To that end, he built a new doctrinal framework—rooted in historical practice and balancing the legitimate institutional interests of both branches.[240] On the one hand, the Chief Justice looked to curb congressional abuses of the subpoena power—limiting Congress's authority to use broad subpoenas to harass a sitting President and distract him from his important responsibilities.[241] On the other hand, Roberts sought to check President Trump's broad assertions of presidential power—making it clear that the President and Congress were co-equal branches of government.[242] Above all, Roberts tried to craft a

233. *Id.* at 2420 (quoting 12 PARLIAMENTARY HISTORY OF ENGLAND 693 (1812)).

234. *See* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

235. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026 (2020).

236. *Id.* at 2030 (using examples from Presidents Reagan and Clinton).

237. *Id.* at 2029 ("Historically, disputes over congressional demands for presidential documents have not ended up in court.").

238. *Id.* at 2031 ("Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute.").

239. *Id.* at 2035 (seeking a "balanced approach").

240. *Id.* at 2026 ("Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. . . . That distinctive aspect necessarily informs our analysis of the question before us.") (citation omitted).

241. *Id.* at 2034 ("Far from accounting for separation of powers concerns, the House's approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President's personal records.").

242. *Id.* at 2033 ("The standards proposed by the President . . . would risk seriously impeding Congress in carrying out its responsibilities.").

helpful framework to shape future battles between the President and Congress—and, perhaps, offer them a path away from the courts and back to the negotiating table.[243]

Finally, the Chief Justice refused to settle the ultimate question in each case: *whether the President had to hand over his financial records*. Instead, the Court sent both cases back to the lower courts—kicking off a fresh round of litigation guided by the Court's new rulings.[244] As a result, the Chief Justice crafted outcomes that defied easy characterization—with some commentators reading them as wins for the President (and artful dodges by the Chief Justice),[245] others viewing them as a powerful rebuke to the President's aggressive assertions of power,[246] and still others concluding that it was a split decision.[247]

Vance and *Mazars* were both triumphs for the Chief Justice's push to triangulate between constitutional extremes. For the institutionalist Justice, this move sometimes helps to push the Court closer to areas of popular constitutional consensus and dampen the threat of widespread public backlash.[248] At the same time, critics may fear that this same move might allow savvy

243. *Id.* at 2035 (building a new doctrinal test and instructing the lower courts to "perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President").

244. *See id.* at 2036; *Vance*, 140 S. Ct. at 2431.

245. *See, e.g.*, Ian Millhiser, *The Supreme Court Just Dealt a Huge Blow to Congress's Power to Investigate Trump*, VOX (July 9, 2020, 1:27 PM), https://www.vox.com/2020/7/9/21318612/supreme-court-trump-mazars-vance-john-roberts-subpoenas-tax-returns.

246. *See, e.g.*, Michael Waldman, Opinion, *Trump May Have Won the Political Battle. But He Lost the Constitutional One*, WASH. POST (July 13, 2020), https://www.washingtonpost.com/opinions/2020/07/09/trump-may-have-won-political-battle-he-lost-constitutional-one/.

247. *See, e.g.*, Editorial, *The Court Rejects Trump's Imperious Arguments on Subpoenas, But It Doesn't Go Far Enough*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/opinions/the-court-rejects-trumps-imperious-arguments-on-subpoenas-but-it-doesnt-go-far-enough/2020/07/09/50a62af2-c215-11ea-b4f6-cb39cd8940fb_story.html.

248. Donnelly, *supra* note 28, at 110–32. Early—if crude—evidence suggests that the Chief Justice embraced positions consistent with public opinion in most of the recent Term's blockbuster cases. *See* Adam Liptak & Alicia Parlapiano, *The Supreme Court Aligned with Public Opinion in Most Major Cases This Term*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/interactive/2020/06/15/us/supreme-court-major-cases-2020.html.

Justices to steer clear of the appearance of constitutional extremism, even as they pursue an ambitious agenda.[249]

F. The Pursuit of Institutional Humility

The institutionalist Justice cares about the Supreme Court's proper role within our constitutional system.[250] This often leads her to pursue the path—or, at least, strike a pose—of institutional humility.[251] This move is at the core of the Chief Justice's vision—with Roberts often preaching about the limited powers of the Court, the virtues of judicial restraint, and the perils of legislating from the bench.[252] By embracing this path, the Chief Justice looks to bolster the Court's institutional legitimacy—advancing a vision of a *constrained* Court engaged in law (*not* politics), legal analysis (*not* policymaking), and deliberative decision-making (*not* reflexive partisanship).[253]

To his critics, Roberts's expressions of institutional humility ring hollow—reading like little more than Supreme Court boilerplate.[254] After all, the Chief Justice sometimes *does* embrace muscular decisions that divide the Court ideologically, unsettle well-established precedent, and gut landmark statutes.[255] However, read charitably, these words express Roberts's genuine commitment to a certain vision of institutional maintenance.

Importantly, the Chief Justice *has* often lived up to this vision of institutional humility in practice, engaging in a range of moves that advance it across a number of cases: deferring to the elected branches, adopting a purposivist approach to statutory interpretation, applying technical legal doctrines (like constitutional avoidance and severability), and embracing stare

249. *See, e.g.*, Leah Litman, *Progressives' Supreme Court Victories Will Be Fleeting*, ATLANTIC (July 14, 2020), https://www.theatlantic.com/ideas/archive/2020/07/court-gave-progressives-hollow-victories/614101/; Editors, *Roberts Misrules*, NAT'L REV. (June 29, 2020, 7:10 PM), https://www.nationalreview.com/2020/06/supreme-court-abortion-decision-chief-justice-john-roberts-misrules/.

250. Frankfurter, *supra* note 27, at 34–35.

251. *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41 (1961).

252. *See, e.g.*, Rosen, *supra* note 125.

253. FALLON, *supra* note 26, at 35–36.

254. *See, e.g.*, Jeff Shesol, *John Roberts Is No Hero*, SLATE (June 28, 2012, 5:55 PM), https://slate.com/news-and-politics/2012/06/john-roberts-is-hardly-the-hero-and-judicial-statesman-people-make-him-out-to-be.html.

255. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2006).

decisis. In this Section, I use illustrative examples to explore each move, in turn.

1. Deference to the Elected Branches

To advance a vision institutional humility, Roberts sometimes follows a familiar path: *deference to the elected branches*. Within constitutional theory, this approach extends back (at least) to 1893, with James Bradley Thayer's famous account in the *Harvard Law Review*.[256] It has appealed to a range of voices across generations—perhaps, most notably, to Felix Frankfurter.[257] And even if no Justice—including John Roberts (or even Frankfurter himself)—has embraced it in every case, it remains a powerful alternative to judicial supremacy.

For instance, let's return to the Chief Justice's dissent in *Obergefell*. There, while Roberts acknowledged that public opinion was shifting in the direction of marriage equality, he refused to write this emerging popular consensus into constitutional doctrine.[258] Instead, he argued that the key question in the case was one of institutional role—the question of *who* should decide the issue of marriage equality.[259] For Roberts, the answer was clear: the elected branches, not the Supreme Court.[260]

The Chief Justice used his *Obergefell* dissent to offer a history lesson about the dangers of Supreme Court policymaking. He embraced many of his Harvard Law School predecessors—connecting his vision of a constrained Court to arguments advanced by other prophets of judicial restraint like Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Henry Friendly, and John Marshall Harlan II.[261] Furthermore, Roberts celebrated the nation's debate over marriage equality—and the public's evolving

256. Thayer, *supra* note 23, at 144 (urging courts to only invalidate a law when the legislature has "not merely made a mistake," but has "made a very clear one,—so clear that it is not open to rational question").

257. Snyder, *supra* note 74, at 345.

258. Obergefell v. Hodges, 576 U.S. 644, 686–713 (Roberts, C.J., dissenting).

259. *Id.* at 688 ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.").

260. *Id.*

261. *See id.* at 687, 696–97, 701, 705–06 (quoting Brandeis, Friendly, Harlan and Holmes); AKHIL REED AMAR, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC 29–55 (2015) (describing Harvard's constitutional legacy).

views on the issue—fearful that the Court's decision might close off an important constitutional discussion and result in public backlash.[262]

Importantly, the Chief Justice also offered his own theory of institutional legitimacy—drawing a direct connection between *Obergefell* and, in his view, previous judicial mistakes like *Lochner v. New York*.[263] As Roberts explained, the Court's authority (and, in his own words, "legitimacy") "flow[] from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law."[264] However, in Roberts's view, "the majority's approach" in *Obergefell* had "no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* . . . ."[265]

Roberts then outlined his own conception of the Court's proper institutional role—one sensitive to the relationship between legal expertise, public opinion, and institutional reputation:

> [A] much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds.[266]

This passage ties together some of Roberts's favorite themes, including judicial modesty, institutional legitimacy, and the importance of legal expertise.[267]

While Roberts's *Obergefell* dissent advanced a conservative substantive outcome, he has also embraced judicial restraint when it has led him to side with the Court's progressives. For instance, consider the Chief Justice's approach to one of the first coronavirus cases to reach the Supreme Court: *South Bay United Pentecostal*

262. *Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting) ("Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today.").

263. *Id.* at 694.

264. *Id.* at 708.

265. *Id.* at 694.

266. *Id.* at 712–13.

267. We see similar themes in the Chief Justice's opinion in *NFIB*. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 538 (2012) ("[W]e possess neither the expertise nor prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders . . ..").

Church v. Newsom.[268] There, to slow the spread of the coronavirus, the California Governor issued an executive order placing a limit on the size of various public gatherings—including religious services—throughout California.[269] The challengers called on the Court to block the enforcement of the Governor's order, arguing that it violated the First Amendment's Free Exercise Clause.[270] In this early case, the Court turned away the challenge in a five-to-four ruling, with the Chief Justice breaking with his conservative colleagues.[271]

Roberts wrote a concurring opinion, wrestling with the case's central tension—how to strike the right balance between the Constitution's protection of individual rights and the traditional police powers of the states in the middle of a global pandemic. The Chief Justice settled on a constrained role for the Court, embracing Justice John Marshall Harlan's century-old vision of federalism in *Jacobson v. Massachusetts*[272] and granting state officials considerable deference to craft a policy response to meet the challenges of a public health emergency.[273] On this view, the states have substantial powers to protect the health, safety, and welfare of their citizens, while the Court has only limited competence—and even less authority—to assess the wisdom of a state's policy choices.[274]

Turning to the specifics of the case itself, Roberts concluded that the state's policy was consistent with the First Amendment's protection of religious liberty.[275] Under the Governor's order, California had placed restrictions not just on religious services, but also on similar secular gatherings like public lectures and sporting events.[276] At the same time, the state granted exemptions to activities like operating a grocery store that didn't involve "people . . . congregat[ing] in large groups" and "remain[ing] in close proximity for extended periods."[277]

268. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); *see also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

269. *Newsom*, 140 S. Ct. at 1613.

270. *Id.*

271. *Id.*

272. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

273. *Newsom*, 140 S. Ct. at 1613.

274. *Id.* at 1613–14.

275. *Id.* at 1613.

276. *Id.*

277. *Id.*

In the end, Roberts refused to second-guess the state's policy judgment—especially given the case's specific context, with a party "seek[ing] emergency relief" and with local officials "actively shaping their response to changing facts on the ground."[278] At the same time, Roberts didn't shut the door to future constitutional challenges, stressing that those decisions would turn on similar fact-specific inquiries. As the Chief Justice explained, "The precise question of when restrictions on particular activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."[279] This is a classic Roberts move—narrowing the reach of a specific ruling, while still setting down constitutional markers and preserving a key role for the Court (and himself) in future challenges.

Of course, with the passage of time and with the tragic death of Justice Ruth Bader Ginsburg, the Roberts Court has begun to reverse course in this area—checking some state pandemic policies and embracing some constitutional limits on the police powers of the states.[280] Even so, Roberts himself continues to embrace the virtues of institutional humility in this challenging context—acknowledging the important religious interests implicated by these cases even as he tries to steer the Court clear of politically perilous issues whenever possible.[281]

2. A Purposivist Approach to Statutory Interpretation

To advance a vision of institutional humility, Roberts sometimes embraces a purposivist approach to statutory interpretation—particularly in high-profile cases with constitutional undertones. For the purposivist, the central goal of statutory interpretation is (not surprisingly) to interpret a statute's text in a way that realizes Congress's *purpose*.[282] To be clear, the purposivist doesn't ignore a statute's text. However, she *does* sometimes allow extrinsic evidence of congressional purpose—like

278. *Id.* at 1614.

279. *Id.* at 1613.

280. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (per curiam) (blocking an executive order issued by the Governor of New York limiting attendance at religious gatherings in certain areas of New York City).

281. *Id.* at 75 (Roberts, C.J., dissenting) (concluding that "[t]here is simply no need" to grant injunctive relief and rule on the "serious and difficult" constitutional "question" in this case because the Governor has already granted relief to the challengers).

282. *See* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332–33 (1990).

statements from a statute's legislative history or her understanding of the paradigm "evil" that Congress sought to address—to outweigh the most natural reading of the statute's text.[283]

To purposivism's critics, this statutory approach risks empowering judges and permitting them to read their *own* purposes into statutes enacted by Congress. On this view, it is better to stick to the statute's text, downplay (or ignore) extrinsic evidence, and steer clear of the murky terrain of congressional intent.[284] However, viewed charitably, a purposivist approach subordinates a Justice's own policy preferences to Congress's broader vision—preventing drafting errors, clumsy writing, or legal technicalities from subverting a statute's central purpose. Roberts has sometimes used purposivism in this way.[285]

For instance, a mere three years after *NFIB*, the Roberts Court confronted *another* legal challenge to the ACA in *King v. Burwell*—this time, a statutory challenge (with a healthy dose of federalism) arguing that the ACA's text meant that individuals in states with federal exchanges couldn't receive tax credits to help them buy health insurance.[286] While the challengers made a plausible textual argument, Roberts pushed it aside, offering a charitable reading of a key progressive statute and attracting the support of one of the *NFIB* dissenters, Justice Kennedy.[287] In the process, Roberts surprised many observers by building a strong cross-ideological majority and rejecting efforts to allow legal technicalities to destroy the sitting President's landmark achievement.[288] Instead, Roberts embraced (what he took to be) the statute's central purpose—increasing the American people's access to affordable health care—

283. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70–71 (2006).

284. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1308–09, 1330–42 (2020).

285. *See, e.g.*, EPA v. EME Homer City Generation, 572 U.S. 489 (2014) (joining a six-to-three majority to adopt a purposivist reading of the Clean Air Act and uphold a new EPA rule addressing interstate air pollution). *But see* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (joining a six-to-three majority and embracing a textualist approach to Title VII).

286. King v. Burwell, 135 S. Ct. 2480 (2015); Brief for Professors Thomas W. Merrill et al. as Amici Curia Supporting Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) (explaining the constitutional dimensions of the case—focusing especially on federalism).

287. *King*, 135 S. Ct. at 2484.

288. *See, e.g.*, Michael A. Bailey, *Surprised that* King v. Burwell *Was 6-to-3?*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/06/26/surprised-that-king-v-burwell-was-6-to-3/ (highlighting the range of surprised reactions to the *King* decision by commentators from across the ideological spectrum).

and interpreted the statutory provisions at issue in *King* in a way most consistent with that vision.[289]

3. Technical Legal Doctrines: Constitutional Avoidance and Severability

To advance a vision of institutional humility, Roberts sometimes applies technical legal doctrines like constitutional avoidance and severability. Sometimes he uses these doctrines to narrow the scope of a ruling.[290] Sometimes he uses them to avoid conflict with the elected branches.[291] And sometimes he uses them to save a statute's core provisions even as he strikes down others.[292] All told, these legal doctrines allow the institutionalist Justice to steer clear of threats to the Court's legitimacy (like public backlash) and vindicate the processes of popular lawmaking (by protecting a statute's core provisions).[293]

For instance, consider the Chief Justice's use of constitutional avoidance in *NFIB*.[294] There, as part of his constitutional analysis, Roberts endorsed the challengers' interpretation of the ACA's individual mandate as the most natural reading of the statute.[295] However, he went on to conclude that his hands were tied by precedent—namely, the Court's reliance on the doctrine of constitutional avoidance.[296] As Roberts explained, "[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."[297] Furthermore, as in *Obergefell*, Roberts traced his approach to the commands of (Harvard-educated) legal giants like Joseph Story and Oliver Wendell Holmes.[298]

289. *King*, 135 S. Ct. at 2485–87.

290. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207–08.

291. *See* NFIB v. Sebelius, 567 U.S. 519, 562 (2012).

292. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2015).

293. Grove, *supra* note 1, at 2245.

294. *NFIB*, 567 U.S. at 562; *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (using constitutional avoidance to dodge a challenge to the constitutionality of the Voting Rights Act).

295. *NFIB*, 567 U.S. at 562 ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance.").

296. *Id.* at 562–63 ("Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one. . . . Granting the Act the full measure of deference owed to federal statutes, it can be so read . . . .").

297. *Id.* at 562.

298. *Id.* at 562–63.

The Chief Justice embraced a separate doctrine—severability—to avoid the threat of institutional harm in *Seila Law*.[299] There, the Court struck down a key part of the Dodd-Frank Act—eliminating a provision curbing the President's removal power and, as a result, making the CFPB Director removeable at-will by the President.[300] At the same time, the Chief Justice used severability to limit the ruling's reach—jettisoning the faulty provision while leaving the rest of the law in place.[301]

In his severability analysis, Roberts stressed institutional humility, focusing on how severability ensures that even as the Court exercises its power of judicial review, it works to preserve as much of Congress's statutory vision as possible. As Roberts explained, "[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[302] While the Court had no authority to "re-write Congress's work by creating offices, terms, and the like," it *did* have a duty to honor the democratic process and protect a statute's core provisions.[303]

Turning to the Dodd-Frank Act itself, Roberts concluded that its removal provision was severable from the rest of the Act. In his view, the Act's other provisions "remain[ed] fully operative without the offending tenure restriction."[304] Furthermore, he saw "nothing in the text or history of the Dodd-Frank Act that demonstrate[d] Congress would have preferred *no* CFPB to a CFPB supervised by the President."[305] In short, "Congress . . . prefer[red] that" the Court "use a scalpel rather than a bulldozer in curing the constitutional defect."[306] By using severability to preserve much of the Act, Roberts settled for an opinion that expressed a broad

299. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207–08 (2020); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508 (2015) (using severability in a similar way). While Justices Thomas and Gorsuch refused to join that part of the Chief Justice's opinion, Roberts managed to build a cross-ideological coalition on severability—combining the Court's progressives and two of his fellow conservatives (Justices Alito and Kavanaugh). *See Seila Law*, 140 S. Ct. at 2191.

300. *Seila Law*, 140 S. Ct. at 2191.

301. *Id.* at 2207–08.

302. *Id.* at 2209 (citing *Free Enter. Fund*, 561 U.S. at 508).

303. *Id.* at 2211.

304. *Id.* at 2209.

305. *Id.*

306. *Id.* at 2210–11.

constitutional vision but had only a modest practical effect on the CFPB itself.[307]

4. Stare Decisis

Finally, to advance a vision of institutional humility, Roberts sometimes embraces stare decisis. By following the principles set out in previous rulings, an institutionalist Justice honors the wisdom of her predecessors.[308] She vindicates important rule-of-law values—ensuring consistent treatment of similar cases and promoting stability in the law.[309] And she establishes a coherent (and reliable) framework for decision makers outside of the courts, allowing them to plan, coordinate, and act.[310]

Of course, most Justices hold their own strong views about both the law and policy.[311] Chief Justice Roberts is no exception. Sometimes these views shape his approach to certain areas of the law—for instance, his push to rebalance the relationship between church and state.[312] However, other times he allows the "gravitational force of precedent" to constrain him—permitting previous rulings to outweigh his own independent constitutional judgment in specific cases.[313] For instance, consider the Chief Justice's approach to *June Medical Services v. Russo*—the most powerful example of Roberts embracing stare decisis in a high-profile case.[314]

There, the Supreme Court reviewed a Louisiana law requiring doctors to secure admitting privileges in local hospitals before performing abortions.[315] Abortion providers challenged the law as an undue burden on a woman's access to an abortion.[316] Four years

307. *Id.* at 2211.

308. *See* Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755–57 (2002).

309. Post, *supra* note 168, at 16.

310. *See* John M. Finnis, *Law as Co-ordination*, 2 RATIO JURIS 97, 100 (1989).

311. *See, e.g.*, SEGAL & SPAETH, *supra* note 13, at 7.

312. *See* Michael W. McConnell, *On Religion, The Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html.

313. *See* DWORKIN, *supra* note 115, at 112.

314. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020). The Chief Justice also joined Justice Alito's dissent in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1426 (2020)—one of Roberts's few losses in October Term 2019. In his *Ramos* dissent, Alito relied heavily on the power of precedent. *Id.* (Roberts, C.J., dissenting).

315. *June Med. Servs.*, 140 S. Ct. at 2112.

316. *Id.*

earlier, in *Whole Woman's Health v. Hellerstedt*, the Court struck down a similar Texas law in a five-to-four decision, with Justice Kennedy joining the Court's progressives.[317] This time, Roberts cast the decisive vote, breaking with his conservative colleagues and voting with the Court's progressives to strike down the Louisiana law.[318]

While the Chief Justice had dissented in *Whole Woman's Health*, he reversed course in *June Medical,* choosing to apply Court precedent. Roberts used this act of self-denial to frame important lessons about institutional humility—exploring the value of the law-politics distinction, the dangers of judicial policymaking, and the virtues of stare decisis. For instance, Roberts began his *June Medical* concurrence by highlighting his vote four years earlier in *Whole Woman's Health*—even emphasizing that he "continue[d] to believe that the case was wrongly decided."[319]

At the same time, he framed *June Medical* not as an opportunity to relitigate the past, but instead as an important moment to reflect on the value (and bite) of stare decisis, observing, "The question today . . . is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[320] From there, Roberts explained, "[F]or precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly"—for instance, factors like a precedent's "administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered."[321] This analysis should be "pragmatic and contextual," not "mechanical."[322]

For Roberts, stare decisis promoted a range of institutionalist virtues. It constrained judges and guarded against the dangers of judicial policymaking.[323] It promoted fairness and predictability in

317. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

318. *June Med. Servs.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring in the judgment).

319. *Id.*

320. *Id.*

321. *Id.* at 2134.

322. *Id.* at 2135.

323. *Id.* at 2134 ("The constraint of precedent distinguishes the judicial 'method and philosophy from those of the political and legislative process.'") (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944)).

the law.[324] It drew on the practical wisdom of previous judges.[325] And overall, it preserved the Court's institutional "integrity"—proving that the law wouldn't shift with the political winds or an individual Justice's personal whims.[326] In the process, the Chief Justice drew on a range of voices from the constitutional canon (and from across the ideological spectrum), including William Blackstone, William Brennan, Edmund Burke, Alexander Hamilton, Robert Jackson, and Antonin Scalia.[327]

In the end, Roberts explained his vote in *June Medical* directly (and concisely):

> *Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law . . . . For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.[328]

The Chief Justice's *June Medical* concurrence represents one of his clearest expressions of institutional humility in any constitutional case.

G. Conclusion: Tending to the Supreme Court's Legitimacy in a Polarized Age—The Challenge of Meeting Today's Constitutional Moment

In this Part, we addressed issues of constitutional practice—using Chief Justice Roberts's track record to identify the tools available to a Justice as he or she works to bolster the Supreme Court's legitimacy in concrete cases. However, this institutionalist mission calls for far more than clever tactics and an embrace of legal craft. To succeed, a Justice's actions must meet the demands (and constraints) of her own constitutional moment. In short, the institutionalist Justice must adopt a regime perspective.

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324. *Id.* ("Adherence to precedent is necessary to 'avoid an arbitrary discretion in the courts[.]'") (quoting THE FEDERALIST NO. 78, at 407 (Alexander Hamilton) (Gideon ed., 2001)).

325. *Id.* (explaining that stare decisis is "grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them").

326. *Id.* (observing that stare decisis protected the "'perceived integrity of the judicial process'") (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

327. *Id.* at 2134–36.

328. *Id.* at 2141–42.

III. THE ROBERTS COURT IN CONSTITUTIONAL TIME: THE VALUE OF ADOPTING A REGIME PERSPECTIVE

Today's constitutional moment presents its own set of opportunities and challenges for the Roberts Court. With our political parties polarized and our elections competitive, neither party has taken control of our nation's politics.[329] This period of political stalemate strengthens the Roberts Court—shifting power away from the elected branches and towards the judiciary.[330] To many commentators, the Court's conservative majority seems in control of our nation's constitutional politics. However, the constitutional present features a more complex story than that, and the future is even less certain.

Of course, commentators have long predicted the collapse of Republican power and the emergence of a new Progressive Era—fueled by a combination of demographic trends, generational replacement, and rising inequality.[331] These predictions began with President George W. Bush, the Iraq War, and the Great Recession.[332] They accelerated with the election of Barack Obama and a powerful Democratic majority in Congress.[333] And they stalled for a time with the rise of the Tea Party, the resurgence of congressional Republicans, and the election of Donald Trump.[334] But even then, the Trump Administration itself provided a springboard for a new wave of progressive optimism.[335]

Within the legal academy, Jack Balkin offers the most recent (and prominent) installment of this argument on behalf of a new

329. MCCARTY ET AL., *supra* note 4, at 10.

330. Lee, *supra* note 3, at 272–73.

331. For the classic statement of this argument, see JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY (2002).

332. *See* Gerard N. Magliocca, *George W. Bush in Political Time: The Janus Presidency*, 34 L. & SOC. INQUIRY 473 (2009).

333. *See* STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 167–94 (2d ed. 2011).

334. *See* Richard Kreitner, *What Time Is It? Here's What the 2016 Election Tells Us About Obama, Trump, and What Comes Next*, NATION (Nov. 22, 2016), https://www.thenation.com/article/archive/what-time-is-it-heres-what-the-2016-election-tells-us-about-obama-trump-and-what-comes-next/.

335. *See* Thomas B. Edsall, *The Fight Over How Trump Fits in With the Other 44 Presidents*, N.Y. TIMES (May 15, 2016), https://www.nytimes.com/2019/05/15/opinion/trump-history-presidents.html; Scott Lemieux, *Is Donald Trump the Next Jimmy Carter?*, NEW REPUBLIC (Jan. 23, 2017), https://newrepublic.com/article/140041/donald-trump-next-jimmy-carter; Julia Azari, *Trump's Presidency Signals the End of the Reagan Era*, VOX (Dec. 1, 2016, 10:10 AM), https://www.vox.com/mischiefs-of-faction/2016/12/1/13794680/trump-presidency-reagan-era-end.

Progressive Era.[336] In Balkin's view, the Reagan regime is collapsing.[337] Donald Trump is a symptom of its decline.[338] And the Democratic Party is poised to complete a reconstruction of our nation's politics—winning a series of elections, building a genuine governing majority, and constructing a new constitutional regime.[339] While Balkin hedges in certain places,[340] he marshals an impressive array of evidence in support of this constitutional prophecy, drawing on a range of academic disciplines, including history, political science, and constitutional theory.[341]

Even so, scholars should approach Balkin's predictions with a degree of caution. Generally speaking, scholars make for lousy prognosticators. Previous predictions of a progressive realignment have fallen flat. And even the 2008 election (and a once-in-a-generation political talent like Barack Obama) proved to be—at best—a false dawn for the progressive community. In the end, Balkin presents one plausible vision of America's future. However, other futures are possible.

In this Part, I adopt a regime perspective. To that end, I review the regime politics literature—situating the institutionalist Justice's mission within the constraints of a period's governing regime. I analyze the constitutional politics of our polarized age—exploring the various challenges that this political environment presents to Chief Justice Roberts and his colleagues. And finally, I sketch *three* future paths for our nation's constitutional politics, each with its own set of challenges for the Roberts Court and its efforts to preserve its own institutional legitimacy: (1) a Republican political reconstruction, with the *Republican* Party leading a new governing regime; (2) a Democratic political reconstruction, with the *Democratic* Party emerging as our nation's dominant political force; and (3) a political stalemate, with our nation's politics remaining competitive and *neither* party securing an enduring majority.

336. BALKIN, *supra* note 9.

337. *Id.* at 8 ("[T]he Reagan regime that has dominated U.S. politics since the 1980s is slowly grinding to its conclusion."); *id.* at 64 ("The Reagan regime is crumbling.").

338. *Id.* at 8 ("Trump represents the end of the road for the Reagan regime.").

339. *Id.* ("The opposition party—the Democrats—will begin a new political regime and a new cycle of political time.").

340. *Id.* at 6 ("[O]ne can't be entirely sure of the future"); *id.* at 22 ("We won't really know if Trump is a disjunctive president for several years after he leaves office."); *id.* at 27 ("In politics, as in life, . . . nothing is certain.").

341. *Id.* at 3 ("I will use tools from constitutional theory and from political science to try to explain what is happening to American politics: how we got where we are, and where we are likely to be headed in the next few decades.").

A. Institutional Legitimacy, Regime Theory, and the Constraints of Constitutional Politics

Political scientists offer two competing visions of American politics. On one view, political actors are free to act—or not—as they wish, and their successes (or failures) turn on their own strategic choices.[342] On this view, each political actor controls her own destiny and is free to act anew (or not) as she deems fit.[343] When she succeeds, she deserves all of the praise. And when she fails, she has no one to blame but herself. Within the field of public law, this is the vision—more or less—of legalists, attitudinalists, and rational-choice scholars alike.[344]

At the same time, regime theorists offer a competing vision. This vision is rooted in the constraints shaping the actions of each political actor.[345] On this view, an actor's place in political time constrains the politics that she may make at any given moment—in other words, her ability to pursue her own policy goals or, more ambitiously, reshape our nation's core commitments.[346] These patterns similarly constrain Supreme Court Justices.[347]

This vision of politics emerges from the political science literature on American Political Development (APD).[348] As Paul

342. For a helpful overview of this perspective, see Kenneth A. Schepsle, *Rational Choice Institutionalism*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS (Robert E. Goodin ed., 2006).

343. For an influential account applying this view to the presidency, see RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990).

344. For an overview of these competing models, see Kahn & Kersch, *supra* note 46, at 4–7 and Howard Gillman, *The Courts as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 67–70 (Cornell W. Clayton & Howard Gillman eds., 1999). For an influential example of the legalist model, see Mendelson, *supra* note 24. For the canonical statement of the attitudinal model, see SEGAL & SPAETH, *supra* note 13. For key works on the rational-choice model, see FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000).

345. *See* Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building in the Fullness of Time*, 38 NOMOS 111, 113 (1996).

346. SKOWRONEK, *supra* note 45, at 33–34.

347. WHITTINGTON, *supra* note 45, at 3.

348. For the pioneering works in American Political Development, see THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL

Frymer explains, "APD scholars are interested in the historical progression of the nation-state, particularly the creation of institutions designed to expand the government's authority over economy and society."[349] These scholars focus on how institutions change (or stabilize) over time—often using historical methods to understand how institutions emerge, transform, and decline, and, in turn, how existing institutions influence the choices (and opportunities) of political actors.[350] These insights are at the core of regime theory—particularly, Stephen Skowronek's influential scholarship on the presidency.[351]

Studying the flow of American history, Skowronek identifies recurrent cycles of presidential politics based on how a president relates to a period's governing regime and whether that regime is weak or strong.[352] Instead of studying presidents chronologically, Skowronek urges scholars to tend to certain political cycles—what he refers to as the passage of *political time*.[353] All told, he distinguishes between *four* different categories of presidential politics: "reconstruction" (an oppositional President in a weak regime like Abraham Lincoln), "articulation" (an affiliated President in a strong regime like James Monroe), "disjunction" (an affiliated President in a weak regime like Herbert Hoover), and "preemption" (an oppositional President in a strong regime like Richard Nixon).[354] Importantly, these patterns are also useful in understanding the Supreme Court's role in our constitutional system—and, in turn, the opportunities (and constraints) facing the institutionalist Justice.[355]

Traditional APD scholarship casts judges as enemies of state-building—with the *Lochner* Court serving as the paradigm

DEVELOPMENT IN THE UNITED STATES (1991); RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877 (1990); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982).

349. Frymer, *supra* note 46, at 779.

350. *See* Kahn & Kersch, *supra* note 46, at 8. To describe these dynamics, APD scholars use the concept of path dependence—the familiar idea that "[p]ast social policy choices create strong vested interests and expectations, which are extremely difficult to undo." Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 245 (2004).

351. SKOWRONEK, *supra* note 45.

352. *Id.* at 33–34.

353. *Id.* at 34.

354. *Id.* at 34–45.

355. *Id.*

example.[356] However, various scholars have revised this story over time, explaining how judicial decisions can reinforce the actions of the elected branches and, at times, promote the agenda of the governing regime.[357] This line of scholarship grows out of a classic 1957 piece by Robert Dahl, arguing that the Supreme Court generally rules in ways that are consistent with the commitments of the era's dominant political party.[358]

For Dahl, while it's possible for the Supreme Court to resist the governing regime's preferences for a short period of time, the Court's decisions eventually align with them—whether due to the Supreme Court nomination process, threats from the elected branches, or genuine shifts in the Justices' preferences.[359] While Dahl's account envisions a Supreme Court meekly following the governing regime, later scholars argue that elected officials often find it in their political interest to actively empower the judicial branch—whether to settle an issue that's dividing a political coalition, stamp out outlier laws in states and localities, or strike down federal laws that the governing coalition can't repeal due to the various veto points in our legislative system.[360]

Keith Whittington offers the leading account in this literature.[361] Adapting Skowronek's regime model to the relationship between the President and the Supreme Court, Whittington analyzes the Court's "authority . . . to determine the meaning of the Constitution" over time.[362] Following Skowronek, Whittington argues that the Court's power to shape constitutional meaning turns on a set of political cycles influenced by a governing regime's commitments (and strength), the President's relationship to that regime, and the Supreme Court's relationship to *both* the governing regime *and* the President.[363]

356. Frymer, *supra* note 46, at 787–88.

357. *See, e.g.*, Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 ST. AM. POL. DEV. 35 (1993) [hereinafter Graber, *Nonmajoritarian Difficulty*].

358. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 280 (1957).

359. *Id.* at 284–85.

360. *See* Whittington, *supra* note 357, at 587–88; Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 511–13 (2002); Graber, *Nonmajoritarian Difficulty*, *supra* note 357, at 36.

361. WHITTINGTON, *supra* note 45.

362. *Id.* at xi.

363. *Id.* at 23–25.

Applying this perspective to the challenge of tending to the Court's institutional legitimacy, each Justice must act within her own set of constraints—shaped by the governing regime's previous choices, its core commitments, and the relationships between its key players, including the President, Congress, the Supreme Court, political parties, and legal elites.[364] On this view, a number of factors constrain the institutionalist Justice: constitutional doctrine,[365] institutional norms,[366] public opinion,[367] the composition of the Supreme Court,[368] the balance of power between the political parties,[369] the President's political strength,[370] the relationship between the Supreme Court and the elected branches,[371] and the contours of elite legal culture.[372] While the institutionalist Justice is far from powerless before these forces, no Justice can fully escape the constraints of her own constitutional moment.

B. Analyzing Today's Constitutional Regime: The Challenge of Tending to the Supreme Court's Legitimacy in a Polarized Age

In this section, I explore the contours of our current constitutional moment—its political environment, its legal culture, and the Roberts Court's internal politics. In the end, the constitutional politics of our polarized age threatens the Supreme Court's institutional legitimacy and presents a range of challenges to Chief Justice Roberts and his colleagues.

1. America's Polarized Politics: Divided Parties, Competitive Elections,

364. BALKIN, *supra* note 9, at 24.

365. Mendelson, *supra* note 24, at 593.

366. *See* Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847 (2013); Gillman, *supra* note 344, at 67.

367. *See* FRIEDMAN, *supra* note 22; ROSEN, *supra* note 80; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491 (1997).

368. *See* SEGAL & SPAETH, *supra* note 13; MALTZMAN, SPRIGGS II & WAHLBECK, *supra* note 344; EPSTEIN & KNIGHT, *supra* note 344.

369. *See* Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17 (2000) [hereinafter Graber, *Jacksonian Origins*]; Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998) [hereinafter Graber, *Federalist or Friends of Adams*].

370. WHITTINGTON, *supra* note 45.

371. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

372. *See* DEVINS & BAUM, *supra* note 43; BAUM, *supra* note 43; Baum & Devins, *supra* note 43.

and a Gridlocked Washington

In 1950, the American Political Science Association (APSA) published an unprecedented report calling for reform of our nation's political parties—*Toward a More Responsible Two-Party System*.[373] At the time, both the Republican and Democratic coalitions were ideologically diverse—with the Republican Party including a sizeable Northern liberal wing and the Democratic Party including a powerful Southern segregationist wing. Frustrated with Southern attempts to block civil rights legislation and driven by leading political scientists like E. E. Schattschneider,[374] APSA issued its report calling for ideologically coherent parties—parties that offered clear choices to the voters, received a mandate for their agendas on election day, and promoted electoral accountability.

Over a half-century later, we now live in Schattschneider's dream world. Unfortunately, for many Americans, Schattschneider's political dream has become our own real-world nightmare.

American politics is more polarized today than it's been since Reconstruction.[375] In Washington, Republicans have become more conservative.[376] Democrats have become more liberal.[377] And moderates are increasingly rare.[378] Within the electorate, voters have increasingly sorted themselves by party,[379] and partisan identity has become an important social identity—influencing how we organize the world, sort friends from enemies, and separate fact from fiction.[380]

373. *See* Am. Pol. Sci. Ass'n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. 1 (1950).

374. For examples of Schattschneider's influential arguments about the role of responsible political parties in the American political system, see E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960) and E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT (1948).

375. Lee, *supra* note 3, at 263.

376. MCCARTY ET AL., *supra* note 4, at 17–74.

377. Lee, *supra* note 3, at 263.

378. MCCARTY ET AL., *supra* note 4, at 73–74.

379. *See* LENZ, *supra* note 7, at 5–9; LEVENDUSKY, *supra* note 7, at 3; Bartels, *supra* note 4.

380. *See* ACHEN & BARTELS, *supra* note 35, at 5–6; ABRAMOWITZ, *supra* note 4, at 3–8; DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, PARTISAN HEARTS & MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS 3 (2002); Bartels, *supra* note 4, at 37. For classic works on the influence of party identification, see ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, THE AMERICAN VOTER (1960) and Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, *in* IDEOLOGY AND ITS DISCONTENT (David E. Apter ed., 1964).

Of course, many of these trends are consistent with the 1950 APSA Report. And in some ways, today's political system is preferable to a party system that blurs the ideological stakes on election day. Parties *should* offer voters a clear choice, and voters *should* choose the party that matches their substantive preferences. However, America's polarized politics has strained our Madisonian Constitution.[381]

For policymakers, there are only two pathways for overcoming our system's many veto points: an electoral landslide or a politics of compromise. With our parties closely divided and our elections highly competitive, landslides are rare—and with increased polarization, so, too, is political compromise.[382] Over time, political dysfunction increases—with the elected branches unable to fulfill campaign promises, pass new policies, or even do the cyclical tasks of governing like passing a budget or raising the debt ceiling.[383] Because of a closely divided electorate, control of government *does* change. But the window for policymaking keeps getting smaller and smaller.[384]

In short, well-sorted parties and widespread polarization are a mismatch for the mechanics of our constitutional system.[385] Polarization has also infected our legal culture.

2. A Fractured Legal Culture

For much of the twentieth century, the legal profession spoke with a unified voice.[386] Prior to the New Deal, conservatives dominated legal culture—with the legal elite allying with Wall Street and advancing a jurisprudence that prioritized property rights and commercialism.[387] Following the New Deal, legal culture shifted—first, against Supreme Court review of economic regulations, and later, in favor of the Warren Court's efforts to protect individual rights and promote equality.[388] This new liberal consensus transformed elite legal opinion—the views of the

381. MCCARTY ET AL., *supra* note 4, at 4.

382. HETHERINGTON & RUDOLPH, *supra* note 2, at 14.

383. Lee, *supra* note 3, at 274.

384. KREHBIEL, *supra* note 165, at 1–20.

385. Lee, *supra* note 3, at 275.

386. DEVINS & BAUM, *supra* note 43, at 13.

387. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 247–68 (1992).

388. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 17, 19 (1999).

Supreme Court Bar, partners in major law firms, members of the Supreme Court press corps, and scholars in leading law schools.[389]

Of course, legal elites are an important audience for the Justices.[390] They closely track Supreme Court decisions.[391] They praise the rulings that they support. They criticize those that they oppose. And their commentary shapes the reputations of the Justices—both during their lives and for posterity.[392] When this large and influential audience speaks with a single voice, it exerts an influence on the Justices—whether by shaping constitutional common sense, threatening reputational harm, or promising professional praise.[393]

With a common audience, institutionalist Justices can more easily tend to the Supreme Court's legitimacy—an ideal that often trades on a shared culture and a commitment to constitutional consensus. However, since the 1980s, legal culture has fractured.[394]

With liberals dominating many of the citadels of legal power and prestige—academia, Supreme Court advocacy, leading law firms, and the press—conservatives sought to build a legal apparatus of their own.[395] And following the Reagan Revolution, Republican officials used their positions of power to empower young conservative lawyers—lawyers who might later become scholars, elected officials, judges, and even Justices.[396] In turn, the rise of the conservative legal movement spurred countermobilization on the left.[397] And so on.

Today, there is no single, dominant legal culture. Instead, there are many different legal *sub*cultures—with their own substantive agendas, methodological preferences, and views about the Supreme Court's proper role in our constitutional system.[398] These subcultures represent powerful reference groups for the Justices—both shaping their approaches to the law and (often) reinforcing their preexisting policy preferences.[399] These new audiences also

389. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 5–6 (1996).

390. DEVINS & BAUM, *supra* note 43, at 3.

391. Baum & Devins, *supra* note 43, at 1538.

392. DEVINS & BAUM, *supra* note 43, at 44.

393. *Id.* at 3.

394. *See* BALKIN, *supra* note 9, at 118; Lee, *supra* note 3, at 273.

395. GROSSMANN & HOPKINS, *supra* note 4, at 12–13.

396. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 4–5 (2008).

397. DEVINS & BAUM, *supra* note 43, at 43–44.

398. *Id.* at 3.

399. *Id.* at 2–3.

represent a challenge to the normative appeal of any broad-based, cross-ideological conception of Supreme Court legitimacy.[400] In the end, while there remain many legal norms and conventions that distinguish lawyers from everyone else, elite polarization has transformed legal culture—creating new challenges for the Roberts Court and its institutional legitimacy.[401]

3. A Supreme Court in Transition: A Shifting (and Polarized) Political Environment, a Stable (and Conservative) Court, and a Challenge to the Roberts Court's Institutional Legitimacy

In 1957, Robert Dahl wrote one of the most influential passages in the judicial politics literature: "[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[402] This moment seems destined to test Dahl's famous observation.

In today's polarized America, no single lawmaking majority dominates our nation's politics.[403] Our political parties are divided sharply by ideology.[404] Members of each party despise one another.[405] Our national elections are decided by the narrowest of margins.[406] And the winning party shifts from election cycle to election cycle.[407] Once in Washington, our elected officials can't work with members of the opposite party.[408] Compromise is rare, and gridlock is the rule.[409] Even as popular dissatisfaction with politics reaches historic levels, our nation's elected leaders struggle to act.[410] With our nation's politics sharply divided and no single party in control, what would it even mean for the Supreme Court to follow our nation's governing regime?

But the challenge for the institutionalist Justice extends beyond elected politics and popular governance. The legal profession itself is also increasingly factionalized.[411] And even the Supreme Court

400. BALKIN, *supra* note 9, at 118.
401. DEVINS & BAUM, *supra* note 43, at 3.
402. Dahl, *supra* note 358, at 285.
403. HETHERINGTON & RUDOLPH, *supra* note 2, at 3.
404. MCCARTY ET AL., *supra* note 4, at 204.
405. GROSSMANN & HOPKINS, *supra* note 4, at 12–13.
406. MCCARTY ET AL., *supra* note 4, at 4.
407. *Id.*
408. Lee, *supra* note 3, at 274.
409. HETHERINGTON & RUDOLPH, *supra* note 2, at 36.
410. MCCARTY ET AL., *supra* note 4, at 171–202.
411. *See* BALKIN, *supra* note 9, at 118; Lee, *supra* note 3, at 273.

has been sorted by partisanship—with its conservative wing all appointed by Republican Presidents and its progressive wing all appointed by Democratic ones.[412]

At the same time, recent Supreme Court appointments have strengthened the Roberts Court's conservative majority.[413] With Neil Gorsuch's confirmation, President Trump and Senate Republicans replaced an *aging*, intellectual originalist with a *young*, intellectual originalist.[414] With the addition of Brett Kavanaugh, Republicans traded the Court's swing Justice for one of the leading conservative voices in the lower courts.[415] And with the elevation of Amy Coney Barrett, they swapped a progressive icon for a conservative one—representing (possibly) the most dramatic ideological shift in a single Supreme Court seat since Clarence Thomas replaced Justice Thurgood Marshall in 1991.[416] This new conservative majority—young and intellectually formidable—is in a strong position to shape constitutional law for decades.

Finally, with these new appointments, Chief Justice Roberts takes his place as the formal leader of a sizeable conservative majority.[417] Over time, Roberts has emerged as an institutionalist voice on the Court—preaching about the need for institutional humility and the importance of tending to the Supreme Court's legitimacy.[418]

Given his position on the Court, Roberts still has the opportunity to shape the Court's agenda in important ways—combining the Chief Justice's formal authority over opinion assignments with a (sometimes) decisive vote in key cases.[419] With successful coalition building, Roberts might still push the law in his preferred direction in a number of substantive areas. However, he can't do it alone. Roberts's conservative colleagues have the

412. DEVINS & BAUM, *supra* note 43, at 2.

413. *See* BALKIN, *supra* note 9, at 95; WHITTINGTON, *supra* note 16, at 299–300.

414. Grove, *supra* note 1, at 2242.

415. *See* Scott Shane, Steve Eder, Rebecca R. Ruiz, Adam Liptak, Charlie Savage & Ben Protess, *Influential Judge, Loyal Friend, Conservative Warrior—and D.C. Insider*, N.Y. TIMES (July 14, 2018), https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html.

416. *See* Brett Kendall & Jess Bravin, *Amy Coney Barrett: What Comes Next and How the Supreme Court Will Change*, WALL ST. J. (Oct. 25, 2020, 12:08 PM), https://www.wsj.com/articles/amy-coney-barrett-what-comes-next-and-how-the-supreme-court-will-change-11603642087.

417. BALKIN, *supra* note 9, at 95.

418. Lee, *supra* note 3, at 273.

419. MURPHY, *supra* note 142, at 81–85.

power—and the votes—to consistently outflank him. Perhaps Roberts will go along with a conservative jurisprudential revolution. Or perhaps he will look to slow it down. If so, Roberts would have to bridge ideological divisions, build durable coalitions, and exercise political leadership on the Court.

In the end, the Roberts Court is a Court in transition—albeit one with a strengthened (and stable) conservative majority. Enter the challenge to Dahl's famous account.

Our overall environment—both legal and political—creates a mismatch between competitive elections, shifts in party control, political gridlock in Washington, a fractured legal culture, and a young (and conservative) majority on the Supreme Court.[420] These structural factors may increase the Roberts Court's power. However, they also threaten the Court's institutional legitimacy.

With the elected branches deadlocked, the Roberts Court has greater freedom to act—as threats of popular reprisal diminish and calls for public action increase.[421] At the same time, with political power shifting election cycle to election cycle and the Court's conservative majority locked in place, the threat of a legitimacy crisis looms.[422] If progressives manage to sustain political power in the elected branches—at least some of the time—but also face a steady barrage of defeats at the Roberts Court, they may come to lose faith in the Supreme Court as an institution.[423]

With this looming threat, it's little wonder that many progressives focus their attention on Chief Justice Roberts.[424] For progressives, Roberts remains the most persuadable of the conservative Justices—an institutionalist concerned with the Court's (and his own) reputation and eager to prove that the Roberts Court can build coalitions that cross ideological lines. On this view, the Chief Justice should learn from his role in *NFIB v. Sebelius* and moderate his own conservative preferences in enough key cases to guard against charges that the Roberts Court is nothing more than a partisan tool of the Republican Party.[425]

However, following the confirmation of Justice Barrett, Roberts's own power has diminished. From the progressive

420. BICKEL, THE SUPREME COURT, *supra* note 48, at 90.
421. Lee, *supra* note 3, at 273–74.
422. WHITTINGTON, *supra* note 16, at 299–300.
423. Siegel, *supra* note 20, at 968.
424. Grove, *supra* note 1, at 2243.
425. *Id.*

community's perspective, its lawyers must now attract another vote on the Roberts Court in just enough cases to halt a conservative constitutional revolution. The Chief Justice's vote alone won't do. But this view is far too reductive. In our politically volatile age, a range of Justices—from across the ideological spectrum—may fear the threat of a legitimacy crisis and look to preserve the Court's institutional reputation. Furthermore, the Roberts Court's future remains uncertain.

C. The Roberts Court and Institutional Legitimacy: Three Future Paths

In this Section, I preview the Roberts Court's future. To that end, I chart *three* possible paths for our nation's constitutional politics: (1) a period of *Republican* political dominance; (2) a period of *Democratic* political hegemony; and (3) an extended period of political stalemate.[426] Each scenario presents its own set of challenges for the Justices and their efforts to preserve the Court's institutional legitimacy. I consider each scenario—and set of challenges— in turn.

1. The Constitutional Politics of a Republican Reconstruction: The Challenges of Constitutional Articulation

Republicans might complete a reconstruction of our nation's politics.[427] For the Republican Party, the simplest path may have been a resounding electoral victory in 2020—with President Trump securing reelection and Republicans sweeping Congress. However, this was far from the Republican Party's only option.

Even with its electoral loss in 2020, Republicans might still reconstruct our politics in the near future.[428] In this scenario, President Biden is the new Jimmy Carter—*not* FDR. President Trump is the new Richard Nixon—*not* Herbert Hoover. And the next Republican President is the new Ronald Reagan, *not* Dwight Eisenhower—completing a Republican reconstruction, *not* settling for a political role cast by the preexisting regime. (And of course, that's assuming that President Trump himself doesn't become the next Grover Cleveland!) Only time will tell. Regardless, the regime politics literature offers us a way of understanding the dynamics of political (and constitutional) change—including the distinct role

426. *See* WHITTINGTON, *supra* note 45, at 28–81; SKOWRONEK, *supra* note 45, at 33–58.
427. SKOWRONEK, *supra* note 45, at 33.
428. BALKIN, *supra* note 9, at 28.

that the Roberts Court might play as an affiliated Court within a new Republican regime.[429]

Few American elections reshape the political landscape.[430] Generally speaking, voters remain loyal to their parties over time.[431] The parties themselves remain divided over a similar set of issues.[432] And few campaigns—or candidates—challenge a governing regime's core commitments.[433] Sure, party control may shift. New policies may emerge. And the losing party may predict doom. But over time, few parties—or political leaders—are able to shift the political status quo in an enduring way.[434] However, sometimes they succeed.

Sometimes a triggering event—a war, an economic crisis, or a natural disaster—upsets the political equilibrium.[435] Sometimes our nation's demographics shift—whether through immigration, varying birth rates, or changes to the economy.[436] Sometimes a new issue scrambles our political coalitions—emerging from new technology, a cultural shift, or a rising social movement.[437] And sometimes an old issue takes on new salience—redefining the boundaries of our political parties.[438] These developments reshape our politics and remake traditional party coalitions.[439]

No matter the specific cause, the electorate realigns.[440] The parties battle on new political terrain.[441] And the opposition party emerges victorious—ushering in a long-term shift in our nation's politics.[442] Sometimes this political realignment turns on a single

429. *See* WHITTINGTON, *supra* note 16, at 1–37; SKOWRONEK, *supra* note 45, at 1–26; KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 1–32 (2004); JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE 3–17 (1992).

430. *See* V.O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3, 4 (1955).

431. *See* ACHEN & BARTELS, *supra* note 35, at 232–66.

432. *See* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 4 (1989).

433. *See* JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 144 (1983).

434. CARMINES & STIMSON, *supra* note 432, at 10–11.

435. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE, *supra* note 374, at 86.

436. SUNDQUIST, *supra* note 433, at 108–14.

437. *See* BALKIN, *supra* note 9, at 25; CARMINES & STIMSON, *supra* note 432, at 4–12.

438. *See* JOHN H. ALDRICH, WHY PARTIES?: A SECOND LOOK 130–62 (2011).

439. *See* BALKIN, *supra* note 9, at 25; Key, *supra* note 430, at 11.

440. *See* SUNDQUIST, *supra* note 433, at 4. *But see* DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE (2002) (criticizing the realignment literature).

441. *See* SCHATTSCHNEIDER, *supra* note 374, at 80–81.

442. *See* BALKIN, *supra* note 9, at 25.

critical election.[443] Other times it happens over a longer period of time.[444] Either way, the newly dominant party reconstructs our nation's political order—establishing a *new* governing regime with *new* political leadership, *new* core commitments, and a *new* policy agenda.[445]

As Stephen Skowronek observes, the President has often served as an important leader in these pushes for reform.[446] Famously, he refers to these figures—leaders like Abraham Lincoln, FDR, and Ronald Reagan—as "reconstructive" Presidents.[447] These leaders take over at a time when the governing regime is weak.[448] They lead the political opposition and emerge with a popular mandate to begin anew.[449] Over time, they reshape our nation's political agenda, realign its political coalitions, and force the supporters of the old regime to acquiesce.[450] In the process, they lead a new governing regime—with a wide scope of action and a broad mandate.[451]

If the Republican Party completes a political reconstruction, the Roberts Court would emerge as one of its key allies.[452] In this scenario, the Court would steer clear of a legitimacy crisis, and the Chief Justice would be free to lead a conservative Court down a new constitutional path—shifting our nation's constitutional order to match the new regime's core commitments.[453] Keith Whittington describes this push as a *politics of articulation*.[454] This is an unusual posture for a Supreme Court in the early stages of a new regime.

To complete a constitutional revolution, a reconstructive President—and his party—must usually defeat an oppositional Court, filled with elite lawyers appointed by the party that dominated the previous regime.[455] However, the Roberts Court is the product of our nation's long (and unusual) political

443. Key, *supra* note 430, at 4.

444. *See* SUNDQUIST, *supra* note 433, at 294; V.O. Key, *Secular Realignment and the Party System*, 21 J. POL. 198, 199 (1959).

445. *See* BALKIN, *supra* note 9, at 25.

446. SKOWRONEK, *supra* note 45, at 36–39.

447. *Id.* at 44.

448. *Id.* at 36.

449. *Id.* at 37–38.

450. *Id.* at 38.

451. *Id.* at 38.

452. Balkin & Levinson, *supra* note 80, at 1066–80.

453. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 113–19 (1991) [hereinafter 1 ACKERMAN].

454. WHITTINGTON, *supra* note 45, at 23 n.57.

455. *See* BALKIN, *supra* note 9, at 69; Graber, *Jacksonian Origins*, *supra* note 369, at 17–20.

interregnum. For decades, our nation's political parties have battled to a stalemate, with long periods of divided government and neither party securing a clear political advantage.[456] Simply put, the Democrats never secured enough political power within the old regime to build a progressive Supreme Court majority. As a result, within a new Republican regime, Roberts would find himself in the enviable position of leading an affiliated Court during a time of political reconstruction.[457]

Of course, this posture constrains Roberts and his conservative colleagues in certain ways. As Justices deciding cases within a new regime, their main task would be to operate within it, not simply follow their own constitutional vision or policy preferences.[458] Over time, the Roberts Court might look to push its own priorities in certain areas. However, any innovations risk sparking new debates within the governing coalition, leading to friction and, eventually, division.[459] At the same time, with any new Supreme Court vacancies, Republican Presidents would look to replace the Court's progressives with strong conservative voices, perhaps shifting the Court's median Justice further to the right and weakening the Chief Justice's substantive influence on the Court.

In the end, the politics of articulation limits the scope of the Roberts Court's constitutional mandate, but it doesn't eliminate the Court's influence on the regime's constitutional politics. A regime's reconstructive moment leaves many questions unanswered.[460] Reconstructive parties, like ordinary parties, often divide over key issues.[461] And reconstructive electoral mandates—like ordinary electoral mandates—are often imperfect (and unclear).[462] As a result, a reconstructive moment both frames a new agenda and opens up a range of new options for key regime actors, including the Supreme Court.[463]

As Whittington explains, while "[a]n affiliated Court can be expected to articulate the constitutional commitments of the dominant coalition[,]" the Court also functions as an "orthodox innovator[]" within the constitutional regime—"render[ing] new

456. *See* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 8–32 (2004).
457. WHITTINGTON, *supra* note 45, at 82–83.
458. FRIEDMAN, *supra* note 22, at 277–79.
459. *See* SKOWRONEK, *supra* note 45, at 440–46.
460. *Id.* at 41–43.
461. Graber, *Nonmajoritarian Difficulty*, *supra* note 357, at 37.
462. ACHEN & BARTELS, *supra* note 35, at 21–51.
463. WHITTINGTON, *supra* note 45, at 82.

decisions and lay[ing] down new rules that can be explicated as a mere working out of previously established legal principles."[464] Furthermore, because of the Court's political insulation, it's often a useful ally for the regime's political leaders—"mov[ing] forward" on certain issues "where other political officials cannot[,]" whether due to divisions within the governing coalition or the challenges of an overloaded political agenda.[465] In short, the Court "can be inspired by the [regime's] constitutional vision," while "operat[ing] outside the jumble of legislative and electoral politics."[466]

Finally, while the Roberts Court would avoid a serious legitimacy crisis, it wouldn't avoid criticism from the Democratic Party and its allies. Republicans might dominate the new period's politics. But the parties themselves would likely remain polarized. And as the Roberts Court continued to shift constitutional doctrine across a range of issues, the Court's rulings would be sure to outrage the political opposition. Over time, the Chief Justice and his conservative colleagues might face pervasive backlash from (at least) some parts of the progressive coalition (and legal academia), even though they would face few—if any—public challenges that attracted majority support.

Roberts and his conservative colleagues might seek inspiration from the example of Chief Justice Taft and his Court. In the 1920s, Taft received an avalanche of criticism (and his Court faced a wave of court-curbing challenges) from union leaders, progressive activists, and their elected allies—a response to renewed concerns about the Court's anti-regulatory decisions.[467] However, Taft and his conservative colleagues were never in any serious political danger. Conservatives dominated the legal community and Republicans remained the most powerful political force in the elected branches.[468] The same would be true of the Roberts Court in a new Republican regime, at least on the political front. While the Roberts Court (and the Chief Justice himself) might have to endure sustained criticism from progressive activists and members of the

464. *Id.* at 24, 83, 84.

465. *Id.* at 125.

466. *Id.*

467. *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 20 (1994).

468. *Id.* at 179–284.

legal academy, its Republican allies would similarly insulate the Supreme Court from widespread political reprisal.[469]

2. The Constitutional Politics of a Democratic Reconstruction: The Challenges of Mediating a Constitutional Revolution

Democrats might complete a political reconstruction of their own.[470] For the Democratic Party, the simplest path would be to build on President Biden's 2020 electoral victory.

In this scenario, Democrats continue to win elections, securing a history-defying victory in the 2022 midterms, retaining control of the White House in 2024, and building robust majorities in both the House and the Senate. Over a series of elections, the American people decisively reject President Trump's legacy and hold the Republican Party responsible for his failed presidency. These elections and our nation's turbulent politics reshape traditional party coalitions. New blocks of independent and Republican voters support Democratic candidates. President Biden and his political allies enact popular policies, earning the loyalty of new Democratic voters and securing a clear political advantage over the Republican Party. And the Democratic Party itself goes on to win again and again. Over time, the new Democratic majority overturns the old political order, builds a new governing regime, and transforms American politics. Even so, the new regime would still face one powerful constitutional obstacle: an *oppositional* Supreme Court.[471]

The President is a disruptive force in American politics.[472] All Presidents, weak and strong, challenge the existing political order.[473] However, few succeed in overturning it.[474] Successful Presidents advance a new political vision, challenge core regime commitments, and build a durable electoral majority.[475] At the same time, this push for reform often runs up against well-established constitutional doctrine and the rulings of an oppositional Court filled with appointees from the old regime.[476] This often sets up a

469. *See* Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 370–71 (1992).

470. BALKIN, *supra* note 9, at 28–29.

471. WHITTINGTON, *supra* note 45, at 72–73.

472. SKOWRONEK, *supra* note 45, at 19–20.

473. *Id.* at 120.

474. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 18 (1998) [hereinafter 2 ACKERMAN].

475. WHITTINGTON, *supra* note 45, at 28–81.

476. *See* BALKIN, *supra* note 9, at 69; Graber, *Jacksonian Origins*, *supra* note 369, at 18.

constitutional showdown between the President as constitutional reformer and the Court as defender of the old constitutional order.[477] This conflict threatens both the President's claim to a constitutional mandate and the Court's institutional legitimacy.

Each actor—the President and the Supreme Court—claims the authority to define the Constitution's meaning.[478] The President roots his claim in his own popular mandate.[479] The Court grounds its claim in its traditional role as our nation's authoritative legal voice.[480] The Court challenges the President's authority to reshape traditional constitutional understandings.[481] The President attacks the Court as a counter-majoritarian institution that ignores the Constitution's true meaning and grants the opposing party victories inside the courts that it is unable to secure at the ballot box.[482]

In the early stages of a new regime, the oppositional Court doesn't back down from the President's challenge.[483] This should come as no surprise. After all, the Supreme Court often emerges from the previous regime as a powerful political actor.[484] Even as the old regime loses popular support, the Court retains its important constitutional role, pushing ahead with its own agenda even as tensions within the governing coalition increase and political challenges to the regime's authority gain strength.[485] Over time, the Court's rulings crystallize the constitutional understandings of the previous regime and frame the political battles ahead.[486]

By opposing the reconstructive President's push for reform, an oppositional Court sharpens the lines of debate, blocks early policy initiatives, and forces the new regime to consolidate its support.[487] In response, the reconstructive President and her allies step up their political attacks, issue court-curbing threats, and advance assertive

477. WHITTINGTON, *supra* note 45, at 52.

478. *Id.*

479. 1 ACKERMAN, *supra* note 453, at 266–69.

480. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46-47 (1997).

481. WHITTINGTON, *supra* note 45, at 52.

482. KRAMER, *supra* note 117, at 207–26.

483. 2 ACKERMAN, *supra* note 474, at 271–78.

484. WHITTINGTON, *supra* note 45, at 77.

485. *See* WHITTINGTON, *supra* note 45, at 72; CUSHMAN, *supra* note 12, at 13–138.

486. *See* WHITTINGTON, *supra* note 45, at 73; 2 ACKERMAN, *supra* note 474, at 290–306.

487. *See* BALKIN, *supra* note 9, at 69; 2 ACKERMAN, *supra* note 474, at 306–11.

constitutional claims, both inside and outside the courts.[488] After a period of constitutional conflict, the oppositional Court backs down, concluding that the only way to maintain its institutional legitimacy is to acquiesce in the new governing regime and accept its core constitutional understandings.[489]

Enter the constitutional politics of the Roberts Court in a Democratic regime. In this scenario, the Chief Justice leads an oppositional Court within a newly established (and strong) governing regime.[490] As a result, Roberts and his conservative colleagues face two central challenges. On the one hand, they look to use the Court's constitutional authority (and institutional prestige) to defend well-established constitutional doctrine from a Democratic assault. On the other hand, they try to protect the Court from challenges to its institutional legitimacy.

Of course, Roberts would be far from the first Chief Justice to face a serious legitimacy crisis. Most famously, in the 1930s, Chief Justice Hughes sat at the center of a divided Court with a powerful conservative wing challenging FDR's emerging New Deal coalition.[491] Facing the challenge of a Democratic reconstruction, Roberts might look to emulate Hughes, building cross-ideological coalitions, protecting the Court's institutional reputation, and mediating a constitutional revolution.[492]

Roberts himself has already expressed admiration for the New Deal-era Chief, a fellow institutionalist leading the Court during a period of constitutional turbulence.[493] Even so, Hughes had serious tactical advantages that Roberts would lack. Although Hughes did face one of the most perilous times in the Court's history, at least the political winds were clear. Following two electoral landslides, FDR's New Deal coalition was dominant.[494] And while the Court's conservative wing stood firm against some of the New Deal's

488. *See* KRAMER, *supra* note 117, at 128–44; Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009).

489. *See* FRIEDMAN, *supra* note 22, at 195–236; 2 ACKERMAN, *supra* note 474, at 380–82.

490. BALKIN, *supra* note 9, at 95.

491. For an influential overview of the New Deal Court, see WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

492. JACOBSOHN, *supra* note 32, at 181–92.

493. *See* Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perceptions That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html.

494. CUSHMAN, *supra* note 12, at 11–32.

innovations, its members were aging.[495] This combination of Democratic electoral success and the prospect of near-term vacancies offered Hughes both a clear signal and a possible escape hatch. From there, the Court's legitimacy crisis quickly gave way to a sustained Democratic governing majority, new Supreme Court vacancies, and FDR appointees loyal to the New Deal coalition.[496]

Facing a Democratic political reconstruction of his own, Roberts would find no easy solutions. Unlike Hughes, Roberts wouldn't be able to rely on a string of new appointments to save his Court from a legitimacy crisis.[497] The Roberts Court would be an oppositional Court with a young (and stable) conservative majority.[498] Furthermore, in a polarized age, the Justices might be especially reluctant to retire when the opposing party controls the White House.[499] After all, even within a Democratic regime, Republicans would still win the White House every now and again.

At the same time, in the face of adverse rulings, Democrats wouldn't hesitate to step up their political attacks on the Court's conservatives and call for court-curbing measures to check the opposition's constitutional ambitions. This would open up the prospect of sustained constitutional conflict between a *conservative* Court and a *progressive* governing regime. This scenario would place considerable pressure on the Supreme Court—and on Roberts as its Chief Justice—to craft a jurisprudential solution to these ongoing challenges.

With the threat of a legitimacy crisis, Roberts and (at least some of) his conservative colleagues might agree to transform the constitutional order in certain ways, but like Hughes, try to do so on their own terms. In the face of court-curbing threats and a jurisprudential tradition with decreasing normative appeal, Hughes often joined with the Court's progressives (and Justice Owen Roberts) to mediate the New Deal Revolution and set a new jurisprudential course.[500] Chief Justice Roberts might try to do the same—working to build cross-ideological coalitions in high-profile cases, push back against the most radical claims of the constitutional

495. FRIEDMAN, *supra* note 22, at 227–28.

496. *See* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1173-75 (1988).

497. BALKIN, *supra* note 9, at 96.

498. Grove, *supra* note 1, at 2242.

499. *See* BALKIN, *supra* note 9, at 117; Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769, 813 (2006).

500. CUSHMAN, *supra* note 12, at 177–207.

reformers, and strike a balance between traditional constitutional understandings and the new regime's core commitments.[501]

In the end, although the Chief Justice and his conservative colleagues would retain some power within this new regime, they would hardly control our nation's constitutional destiny. On the Court, Roberts himself would still play an important role as both its Chief Justice and a member of its conservative coalition. However, Roberts and his conservative colleagues would have to act within the constraints of the new constitutional moment—defined by the politics of a Democratic reconstruction.[502] Of course, Roberts and his colleagues would still hear cases and issue rulings. But the Democratic regime—*its* Presidents, *its* Congresses, and *its* legal elite—would set the terms of the new political (and constitutional) order.[503] The Chief Justice would still use his institutional power to influence the era's constitutional politics, working to forge an uneasy compromise between established doctrine, his own constitutional vision, and the Democratic Party's core commitments. However, the political context would limit his constitutional authority.

In short, the Democratic regime would set the parameters for the Roberts Court's decisions.[504] To preserve the Court's institutional legitimacy, the Chief Justice—and his oppositional Court—would have to operate within them.[505]

3. The Constitutional Politics of a Political Stalemate: The Challenges of Tending to the Supreme Court's Legitimacy in a Polarized Age

Finally, America's constitutional politics may remain competitive and polarized, with *neither* party securing a political reconstruction.[506] This political stalemate would both empower the Roberts Court and constrain it.

In this scenario, no single party dominates our nation's politics.[507] The parties are sharply divided.[508] And the American

501. JACOBSOHN, *supra* note 32, at 20–22.
502. WHITTINGTON, *supra* note 45, at 31–40.
503. FRIEDMAN, *supra* note 22, at 369–77.
504. WHITTINGTON, *supra* note 45, at 79–81.
505. FRIEDMAN, *supra* note 22, at 196.
506. HETHERINGTON & RUDOLPH, *supra* note 2, at 13.
507. *Id.* at 24–26.
508. *See* MCCARTY, *supra* note 4, at 10; Lee, *supra* note 3, at 263.

people distrust the elected branches.[509] While the Supreme Court's power is far from unlimited, this form of constitutional politics increases the Court's political strength and bolsters its authority to settle the Constitution's meaning.[510]

At the same time, the nation's constitutional future remains uncertain. The parties engage in bitter political debates, and the American people themselves remain sharply divided.[511] The Supreme Court may not face serious peril, but it still receives a steady stream of attacks from activists (and legal elites) on both sides of the political divide.[512] And with legal culture fractured, the Chief Justice struggles to build cross-ideological coalitions on the Court itself.[513]

Finally, an even greater institutional threat looms. With elected politics closely divided and Republicans securing a young (and conservative) majority on the Supreme Court, many advocates focus increasingly on what actors outside of the Court can do to influence what happens inside of its walls. Democratic partisans and their progressive allies call for aggressive measures like court-packing.[514] Legal elites coalesce around structural reforms like Supreme Court term limits.[515] And both parties remain comfortable jawboning the Roberts Court whenever it serves their short-term partisan interests.[516]

Of course, reformers have long struggled to negotiate our political system's many veto points and enact court-curbing measures.[517] However, progressive support for various democratizing reforms, including an end to the Senate filibuster,

509. *See* BALKIN, *supra* note 9, at 46; MCCARTY, *supra* note 4, at 4.

510. Graber, *Nonmajoritarian Difficulty*, *supra* note 357, at 36–37.

511. GROSSMANN & HOPKINS, *supra* note 4, at 12–13.

512. DEVINS & BAUM, *supra* note 43, at 103–46.

513. Lee, *supra* note 3, at 273–74.

514. *See* BALKIN, *supra* note 9, at 96. For leading accounts of court-packing episodes throughout American history, see FRIEDMAN, *supra* note 22, at 167–236; WHITTINGTON, *supra* note 45, at 28–81; KRAMER, *supra* note 117, at 3–8.

515. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

516. *See* Russell Wheeler, *Should We Restructure the Supreme Court?*, BROOKINGS (Mar. 2, 2020); Darren Samuelsohn, *Trump vs. John Roberts: A 2020 Battle for the Supreme Court's Reputation*, POLITICO (Dec. 20, 2019, 5:05 AM) https://www.politico.com/news/2019/12/20/trump-john-roberts-supreme-court-reputation-088287; Philip Elliott, *The Next Big Idea in the Democratic Primary: Expanding the Supreme Court?*, TIME (Mar. 13, 2019, 11:24 AM), https://time.com/5550325/democrats-court-packing/.

517. *See* FALLON, *supra* note 26, at 157; MCCARTY, *supra* note 4, at 4; HETHERINGTON & RUDOLPH, *supra* note 2, at 3; Clark, *supra* note 488, at 971–74.

may eventually clear the way for legislative action, making court-curbing a more realistic threat.[518] From there, a cycle of attack and retaliation follows, with Democrats packing the Court, Republicans responding in kind, and so on.[519] With no filibuster to protect it, the Roberts Court remains vulnerable to political reprisal any time a party manages to secure control of the House, the Senate, and the presidency—altering our system's political incentives, rebalancing political power between the branches, and allowing the President and Congress to exert increased control over the Court.[520] Over time, neither party emerges as a clear winner. But the Court—and its institutional legitimacy—would surely be the biggest loser.

This outcome, though possible, is far from inevitable. In this volatile political environment, Roberts may look to emulate Chief Justice Marshall, working to convince his colleagues to prioritize the Court's institutional legitimacy by both issuing important rulings that negotiate the tensions between various political factions and shying away from decisions that might threaten political backlash against the Court.[521]

Marshall became Chief Justice as the nominee of a lame duck President (John Adams) of a soon-to-be-dead political party (the Federalists).[522] Once on the Court, Marshall faced strong political (and constitutional) opposition, with President Jefferson and his allies leading the charge against him.[523] The Chief Justice fought off serious court-curbing threats, survived the death of the Federalist Party, and led an influential Court through an important period of constitutional development.[524] Over time, Marshall deftly managed cross-cutting coalitions during the Era of Good Feelings and maintained the Court's institutional authority in the early Jackson

518. For the leading account of this push in the progressive community, see EZRA KLEIN, WHY WE'RE POLARIZED 249–68 (2020).

519. *See* Jeff Shesol, *The Case Against Packing the Court*, NEW REPUBLIC (Oct. 14, 2020), https://newrepublic.com/article/159691/case-against-packing-supreme-court.

520. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 35–36 (1991).

521. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 36–38 (2005); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 1–3 (1996); Graber, *Federalist or Friends of Adams*, *supra* note 369, at 262–65.

522. *See* MCCLOSKEY, *supra* note 521, at 24-25; SMITH, *supra* note 521, at 1; Graber, *Federalist or Friends of Adams*, *supra* note 369, at 229.

523. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 163–98 (2007); KRAMER, *supra* note 117, at 121–27.

524. Graber, *supra* note 369, at 229.

years,[525] forging unanimity, building the Court's institutional reputation, and constructing workable (and durable) constitutional doctrine that received the support (or, at least, the acquiescence) of key political actors.[526] In the face of his own set of institutional challenges, perhaps Chief Justice Roberts, a great admirer of the *Great* Chief Justice, can do the same.[527]

CONCLUSION

In the end, the Roberts Court is far from powerless in the face of treacherous political terrain. In a polarized America, the Court retains considerable authority to define the Constitution's meaning. Furthermore, the Chief Justice himself has the opportunity to exercise constitutional leadership. By combining his opinion assignment power with his position near the Court's ideological center, Roberts has a chance to shape the outcome of the Court's most closely divided cases and decide whose voice should speak for the Court, whether it is his own, the voice of one of his most trusted colleagues, or that of a case-specific ally.

To borrow from Robert McCloskey, the Chief Justice has an "opportunity for greatness," an opportunity to shape the law in his own image, move the law in the precise direction (and at the precise pace) of his own choosing, and bolster the Court's institutional legitimacy.[528] Of course, Roberts can't do it alone. He must convince a critical mass of his colleagues to join him on this institutionalist mission. In our polarized age, this is no easy task. Even so, as an institutionalist with a deep sense of Supreme Court history, Roberts may hear the call of constitutional statesmanship.[529] The key question is this: *Will he answer it?*

525. *See* SMITH, *supra* note 521, at 1; Graber, *supra* note 369, at 232–34.

526. *See* MCCLOSKEY, *supra* note 521, at 51; SMITH, *supra* note 521, at 1–3; JACOBSOHN, *supra* note 32, at 192–93.

527. Rosen, *supra* note 125.

528. MCCLOSKEY, *supra* note 521, at 247.

529. *See* Tom Donnelly, *The Promise (and Peril) of Constitutional Statesmanship* (Apr. 3, 2022) (unpublished manuscript) (on file with author).